Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

APPENDIX

In the Supreme Court of the United States

OCTOBER TERM 1971

No. 71-1069

ASSOCIATED ENTERPRISES INC., AND
JOHNSTON FUEL ~~MINES~~, Liners
Appellants

vs.

TOLTEC WATERSHED IMPROVEMENT DISTRICT
Appellee

APPEAL FROM THE SUPREME COURT OF WYOMING

Jurisdictional Statement Filed Feb. 22, 1972
Probable Jurisdiction Noted June 12, 1972

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STATE OF WYOMING)
) SS.
COUNTY OF ALBANY)

IN THE DISTRICT COURT
SECOND JUDICIAL DISTRICT

TOLTEC WATERSHED IMPROVEMENT DISTRICT,	)	
Plaintiff,	)	
vs.	)	**PETITION**
ASSOCIATED ENTERPRISES, INC.,	)	
Defendant.	)	

COMES NOW the Plaintiff and respectfully petitions the Court and alleges the following facts:

1.

Toltec Watershed Improvement District is duly organized under the laws of the State of Wyoming and as such possesses the power of condemnation.

2.

Plaintiff is desirous of building a reservoir on the North Laramie River in the northern portion of Albany County, Wyoming.

3.

Plaintiff believes that said reservoir should properly be built upon the lands belonging to the Defendant described as follows:

Township 26 North, Range 74 West of the 6th P.M.

Section 16: SE¼, S½NE¼

Section 21: NE¼, SE¼, E½NW¼

4.

Plaintiff is not able to determine whether construction of said dam on the foregoing lands is feasible until it has completed its surveys and foundation studies.

5.

Plaintiff is authorized by law to enter upon said lands for the purpose of making said surveys but as a matter of courtesy has requested Defendant's permission to enter upon the lands and make the studies.

6.

Defendant has refused to grant said permission.

7.

Because of the planning and construction timetable set forth by the Soil Conservation Service of the U. S. Department of Agriculture it is necessary that Plaintiff enter upon said

8.

lands and complete said surveys at the earliest possible time.

Plaintiff has agreed in the past to pay for all damages caused owner by its operations and it would also do so in the future.

WHEREFORE PLAINTIFF PRAYS that the Court make and enter an Order allowing Plaintiff, its employees, agents, contractors, and cooperating parties, such as the Soil Conservation Service of the U. S. Department of Agriculture, to enter upon the foregoing described lands for the purpose of carrying out foundation studies for a dam site, including the excavation of test pits, the drilling of test holes, and reasonable ingress and egress over and across the lands of the Defendant to and from the lands specifically described herein.

OR IN THE ALTERNATIVE PLAINTIFF PRAYS AS FOLLOWS:

1.

For an injunction enjoining Defendant or its agents from interferring with the rights of the Plaintiff, its employees, agents, contractors, or cooperating parties from entering upon the aforegoing described lands for the lawful purpose of carrying out surveys and foundation studies for a dam site, including the excavation of test pits, the drilling of test holes and reasonable ingress and egress over

and across the lands of the Defendant to and from the lands specifically described herein.

s/ FRED W. PHIFER
Attorney for Plaintiff
Box 180
Wheatland, Wyoming 82201

APPLICATION FOR HEARING

COMES NOW the Plaintiff in the above entitled action and respectfully moves the Court for an Order fixing the earliest possible time and place for a hearing on the foregoing Petition.

s/ FRED W. PHIFER
Attorney for Plaintiff

SUMMONS IN A CIVIL ACTION

The State of Wyoming,)
)ss.
County of Albany)

IN THE DISTRICT COURT
Second Judicial District
Civil Action No. 14417

TOLTEC WATERSHED IMPROVEMENT DISTRICT, Plaintiff	)	
vs.	)	**SUMMONS**
ASSOCIATED ENTERPRISES, INC., Defendant	)	

To the above named defendant: Associated Enterprises, Inc.

YOU ARE HEREBY SUMMONED and required to file with the Clerk and serve upon the Plaintiff's attorney an answer to the complaint which is herewith served upon you, within 20 days after the service of this Summons upon you, exclusive of the day of Service. (If service upon you is made outside of the State of Wyoming, you are required to file and serve your answer to the Complaint within 30 days

after service of this Summons upon you, exclusive of the day of service). If you fail to do so, judgment by default will be taken against you for the relief demanded in the Complaint.

Dated June 22, 1970.

(Seal of District Court)

Phil Krahn
Clerk of Court

By: Don Koerting
Deputy Clerk

Fred W. Phifer
Attorney for Plaintiff
Box 180, Wheatland, Wyoming 82201

RETURN

State of Wyoming,)
)ss.
County of Albany)

To be used by Wyoming Sheriff, Under Sheriff or Deputy

I, Ted R. Burnstad Sheriff in and for said County of Albany, in the State aforesaid, do hereby certify that I received the within Summons, together with a copy of the Complaint filed in the above matter, and that I served the same in the County aforesaid on the 24 day of June, 1970, by delivering a copy of the same, together with a copy of the Complaint, to Associated Enterprises, Inc. by leaving with Al Bennett Foreman an employee for E. John-

son and Associated Enterprises by leaving with Mrs. Al Bennett, a person over the age of 14 years at the usual place of residence.

T. R. Burnstad
Sheriff

IN THE DISTRICT COURT IN AND FOR ALBANY COUNTY, WYOMING

TOLTEC WATERSHED IMPROVEMENT DISTRICT,	)	
Plaintiff,	)	
-vs-	)	**Civil Action No. 14417**
ASSOCIATED ENTERPRISES, INC.,	)	
Defendant.	)	

ANSWER

1.

Answering paragraph 1 of the Petition the Defendant denies that the Plaintiff is duly organized under the laws of the State of Wyoming or possesses the power of condemnation or the right of entry onto the lands of the Defendant.

2.

Answering paragraph 2 of the Petition the Defendant has no knowledge of the desires of the Plaintiff to build a reservoir and therefore denies paragraph 2 of the Petition.

3.

Defendant has no knowledge of Plaintiff's belief as to where it should build its reservoir, and denies that the Plaintiff's reservoir should

be constructed on Defendant's lands and alleges that there are many excellent reservoir sites on the North Laramie River upon lands of others, including lands of members of Plaintiff, and the Plaintiff should investigate and construct a reservoir upon their own lands.

4.

Defendant has no knowledge of Plaintiff's ability to make a feasibility study or the time required for same and therefore denies the allegation of paragraph 4 of the Petition.

5.

Defendant denies Plaintiff is authorized to enter upon lands described in the Petition to make a survey.

6.

Defendant granted permission to Plaintiff to enter upon its lands and make surveys in the year 1966, pursuant to a written agreement which provided that the Plaintiff would furnish the Defendant with all data and information obtained from its studies, surveys, and drilling. That pursuant to said written agreement, the Defendant did allow the Plaintiff to make surveys and foundation studies upon the Defendant's lands at a time when the making of such surveys and studies would not interfere with the Defendant's use and enjoyment thereof, but that said surveys and studies have never been furnished Defendant, all in derogation of the written agreement between the parties. That to allow entry again is in

effect to grant possession of such lands to the Plaintiff without adequate and just compensation. That at the time entry was requested by Plaintiff, Defendant was calving his cows on such lands and was commencing to irrigate some of the land which is a hay meadow, and any entry by anyone with survey crews and drill rigs would interfere with Defendant's use and possession of his real property, would interfere with his calving and haying operations, and would cause irreparable injury and damage for which Defendant has no adequate relief at law.

7.

That the Defendant has no knowledge of the allegations of paragraph 7 of the Petition and therefore denies the same.

8.

That the Defendant admits the Plaintiff agreed in the past to pay for damages caused by it pursuant to a written agreement, but that the Plaintiff has not complied with the terms of said agreement.

9.

Defendant alleges that the Plaintiff is not a validly organized soil conservation district as it was created and organized under a statute of Wyoming which violates the Wyoming Constitution and the United States Constitution in that such statute violates the "one man, one vote" concept and guarantees of said Constitution and that said district boundaries were

intentionally gerrymandered to prevent a fair election.

10.

That the Plaintiff was not organized in compliance with the laws of the State of Wyoming.

11.

Defendant alleges the Petition fails to state a claim upon which relief may be granted.

12.

Defendant alleges this Court has no jurisdiction in this proceeding and action.

CROSS - CLAIM

Comes now the Defendant and for its claim against the Plaintiff and Cross-Defendant alleges:

1.

That on August 1, 1969 the parties hereto entered into a written agreement pursuant to the terms of which the Defendant would grant permission unto the Plaintiff to enter upon its lands and in exchange for said entry all data and information obtained from such foundation studies to be made by the agent of the Plaintiff would be furnished unto the Defendant.

2.

That Plaintiff and Cross-Defendant has never furnished the information obtained

from foundation studies made upon the Defendant's land and has refused to do so.

3.

That the Cross-Defendant has failed to comply with the terms and conditions of the parties' written agreement dated August 1, 1969. That the Cross-Plaintiff and Defendant has no adequate remedy at law and is being damaged and will be damaged indefinitely if the greement is abandoned by the Cross-Defendant in that it will not have such information and that the Cross-Defendant should be required to conform to the provisions of said written agreement and furnish such information.

WHEREFORE, the Defendant prays that the Complaint of the Plaintiff be dismissed and that the Defendant and Cross-Plaintiff have judgment against the Plaintiff and Cross-Defendant for delivery to Defendant and Cross-Plaintiff of all information obtained from the foundation studies made upon the lands of the Defendant and Cross-Plaintiff.

BURGESS, KENNEDY & DAVIS

By Henry A. Burgess
Attorney for Defendant &
Cross-Plaintiff
P. O. Box 728
Sheridan, Wyoming

(Certificate of Service omitted in printing)

STATE OF WYOMING)
) SS
COUNTY OF ALBANY)

IN THE DISTRICT COURT
SECOND JUDICIAL DISTRICT
Civil Action No. 14417

TOLTEC WATERSHED IMPROVEMENT DISTRICT,
Plaintiff,
vs.
ASSOCIATED ENTERPRISES, INC.,
Defendant.

REPLY

COMES NOW the Plaintiff and for its Reply to the Defendant's Cross-Claim alleges:

1.

Plaintiff admits paragraph 1 of Defendant's Cross-Claim and denies paragraphs 2 and 3.

WHEREFORE Plaintiff prays that Defendant take nothing by his Cross-Claim.

s/ FRED W. PHIFER
Attorney for Plaintiff

(Certificate of Service omitted in printing)

IN THE DISTRICT COURT IN AND FOR ALBANY COUNTY, WYOMING

TOLTEC WATERSHED IMPROVEMENT DISTRICT, Plaintiff,	)	
vs.	)	Civil Action No. 14417
ASSOCIATED ENTERPRISES, INC., Defendant.	)	

MOTION TO INTERVENE

Comes now Johnston Fuel Liners and moves the court to enter its order allowing it to intervene in the above entitled course as a party defendant and allow it to file its answer herein, a copy of which answer to plaintiff's petition is attached, and in support thereof invites the court's attention to the following:

1. That Johnston Fuel Liners is a Wyoming corporation owning lands contigious to the lands described in plaintiff's petition.

2. That movant owns cattle and runs them upon its lands and in addition has a contract to run its cattle on the lands described in the petition of plaintiff and pays valuable consideration therefor.

3. That any entry upon the lands of Toltec is an interference with movant's right to its use and possession of said lands.

4. That movant was not allowed to vote in the referendum held May 12, 1969 are (in) the creation of the Toltec Watershed District.

5. That the movant's rights are different from those represented by Associated Enterprises, Inc., and it is not represented by Associated Enterprises, Inc., and the main action has a question of law and fact in common with movant and movant may be bound by any judgment entered in the action:

BURGESS, KENNEDY & DAVIS

By Henry A. Burgess
P. O. Box 728
Sheridan, Wyoming

(Certificate of Service omitted in printing)

IN THE DISTRICT COURT IN AND FOR ALBANY COUNTY, WYOMING

TOLTEC WATERSHED IMPROVEMENT DISTRICT,	)	
Plaintiff,	)	
vs.	)	**Civil Action No. 14417**
ASSOCIATED ENTERPRISES, INC., Defendant.	)	

SEPARATE ANSWER OF JOHNSTON FUEL LINERS

1.

That this defendant is incorporated under the laws of the State of Wyoming and runs cattle upon the lands described in the complaint pursuant to a contract with Associated Enterprises, Inc., the owner of said lands.

2.

That this defendant is not a landowner within the definition of WS 1957 sec. 41-351.1 (c) but does occupy the lands described in plaintiff's petition which land is within the plaintiff district and that plaintiff's entry upon such lands will interfere with and damage its quiet use and enjoyment of such lands.

3.

That the defendant objects to the entry by plaintiff for the purposes alleged in the pe-

tition upon the lands described in the petition and denies plaintiff has any right to enter upon such lands.

WHEREFORE this defendant prays the petition be dismissed.

BURGESS, KENNEDY & DAVIS

By Henry A. Burgess
Attorneys for Defendant
Johnston Fuel Liners
P. O. Box 728
Sheridan, Wyoming

IN THE DISTRICT COURT IN AND FOR ALBANY COUNTY, WYOMING

TOLTEC WATERSHED IMPROVEMENT DISTRICT,	)	
Plaintiff,	)	
vs.	)	**Civil Action No. 14417**
ASSOCIATED ENTERPRISES, INC.,	)	
Defendant.	)	

STIPULATION OF FACTS

It is stipulated and agreed between Plaintiff and Defendant by their undersigned counsel that if witnesses were sworn and testified in the above action and the available documentary proof introduced, that the following facts would be established, and the parties agree to the same, the evidence of which, except for this agreement need not be introduced in open Court, and that this action may be disposed of by the Court upon the following facts:

1.

That Plaintiff was organized under the provisions of W. S. 1957 Sec. 41-354.1 through 41-354.26 and the referendum held on May 12, 1969 was conducted in accordance with the statutory requirements.

2.

That Johnston Fuel Liners is a Wyoming corporation and owns cattle which it grazes upon the land described in the petition, and which land is also included within the boundaries of Plaintiff. That the corporate officers of Johnston Fuel Liners are the same persons acting as the corporate officers of Associated Enterprises, Inc., but that part of the capital stock of Associated Enterprises, Inc., is owned by persons not stockholders in Johnston Fuel Liners, so that the ownership of the capital stock of two corporations is not identical nor common to the two corporations.

3.

That Johnston Fuel Liners is not a landowner as defined by W. S. 1957 Sec. 41-351.1 (c), and although given notice of the time and place of the referendum, had no legal right to vote and did not vote.

4.

That if Toltec is duly and legally organized, it has the right and power of entry under W. S. 1957 Sec. 1-794 and power of condemnation under W. S. 1957 Sec. 41-354.13C for the legal purposes therein stated.

5.

That Plaintiff desires to build a reservoir on lands owned by Associated Enterprises, Inc., situated in Albany County, Wyoming, which lands are included in said district.

6.

That Plaintiff had requested permission to enter upon Defendant's lands in June 1970 for purposes of survey and examination, and the request was refused.

7.

That Plaintiff has agreed to pay for any damages caused by its entry upon Defendant's lands.

8.

That Defendant has received the information and results of Plaintiff's studies for the year 1969.

That the legal issue presented by the foregoing stipulated facts is as follows:

Is the statutory procedure under W. S. 1957 Sec. 41-354.1 through 41-354.26 for the creation of a Watershed Improvement District constitutional?

DATED August 12, 1970.

s/ FRED W. PHIFER
Attorney for Plaintiff

BURGESS, KENNEDY & DAVIS

By Henry A. Burgess
Attorneys for Defendants
Associated Enterprises, Inc.,
and Johnston Fuel Liners

STATE OF WYOMING)
) SS
COUNTY OF ALBANY)

IN THE DISTRICT COURT
SECOND JUDICIAL DISTRICT
Civil Action No. 14417

TOLTEC WATERSHED IMPROVEMENT DISTRICT,
Plaintiff,
vs.
ASSOCIATED ENTERPRISES, INC.,
Defendant.

INTERROGATORIES

THE DEFENDANT, Associated Enterprises, Inc., will please answer the following Interrogatories within fifteen days after service in accordance with Rule 33 of the Wyoming Rules of Civil Procedure.

1. What is the name and title of the officer answering this Interrogatory?

2. When did Johnston Fuel Liners first commence using the land of Associated Enterprises located in Albany County?

3. Has this use been continuous since then? If not, please give the inclusive dates of the use.

4. Has Associated Enterprises ever owned any cattle that were run on the land which is included in the Toltec Watershed Improvement District and owned by Associated Enterprises? If so, when?

5. What compensation is paid by Johnston Fuel Liners to Associated Enterprises for the use of this land? Please list dates of payment and amounts paid within the last five years.

6. Please attach hereto copies of all the leases between Johnston Fuel Liners and Associated Enterprises covering the land here in question.

7. Please attach hereto copies of any contracts wherein Johnston Fuel Liners has contracted for the use and enjoyment of the land here in question.

Dated this 26th day of August, 1970.

s/ FRED W. PHIFER
Attorney for the Plaintiffs

(Certificate of Service omitted in printing)

IN THE DISTRICT COURT IN AND FOR ALBANY COUNTY, WYOMING

TOLTEC WATERSHED IMPROVEMENT DISTRICT,	)	
Plaintiff,	)	
vs.	)	Civil Action No. 14417
ASSOCIATED ENTERPRISES, INC.,	)	
Defendant.	)	

ANSWERS TO INTERROGATORIES

Defendant, Associated Enterprises, Inc., by Kenneth Cox, its Secretary and Treasurer, answers the Interrgatories served on it by Plaintiff as follows:

INTERROGATORY NO. 1:

Q. What is the name and title of the officer answering this Interrogatory?

A. Kenneth Cox, Secretary and Treasurer.

INTERROGATORY NO. 2:

Q. When did Johnston Fuel Liners first commence using the land of Associated Enterprises located in Albany County?

A. At the time Associated Enterprises acquired the land in 1959 which is within the

boundaries of the Toltec Watershed Improvement District.

INTERROGATORY NO. 3:

Q. Has this use been continuous since then? If not, please give the inclusive dates of the use.

A. Yes, up to and including the date of this Answer.

INTERROGATORY NO. 4:

Q. Has Associated Enterprises ever owned any cattle that were run on the land which is included in the Toltec Watershed Improvement District and owned by Associated Enterprises? If so, when?

A. Associated Enterprises purchased some cattle in 1969 and ran the cattle on lands in the Toltec District.

INTERROGATORY NO. 5:

Q. What compensation is paid by Johnston Fuel Liners to Associated Enterprises for the use of this land? Please list dates of payment and amounts paid within the last five years.

A. Johnston Fuel Liners exchanges the use of the Wedemeyer Ranch near Wheatland, Wyoming for the Malmquist Ranch (a portion of which is in the Toltec District) and in addition pays an annual rental of $2,000 in monthly installments of $166.67 to Associated Enterprises. This agreement was entered into in 1959 and is still existent.

INTERROGATORY NO. 6:

Q. Please attach hereto copies of all the leases between Johnston Fuel Liners and Associated Enterprises covering the land here in question.

A. The agreement is reflected on the journals and records of the companies containing the payments and disbursements and has been performed by the corporations for over ten years. No single written lease document exists. The books and records of Associated Enterprises, Inc. and Johnston Fuel Liners so reflect the agreement, which is on a year to year basis, and it has been approved by the respective boards of directors of the corporations.

INTERROGATORY NO. 7:

Q. Please attach hereto copies of any contracts wherein Johnston Fuel Liners has contracted for the use and enjoyment of the land here in question.

A. See answer to Interrogatory No. 6 above.

KENNETH COX

(Jurat omitted in printing)

(Certificate of Service omitted in printing)

IN THE DISTRICT COURT IN AND FOR ALBANY COUNTY, WYOMING

TOLTEC WATERSHED IMPROVEMENT DISTRICT,	)	
Plaintiff,	)	
vs.	)	**Civil Action No. 14417**
ASSOCIATED ENTERPRISES, INC., and JOHNSTON FUEL LINERS,	)	
Defendants.	)	

ORDER AND JUDGMENT

The above-entitled action came on regularly to be heard on October 2, 1970, by the Court on the Motion of Johnston Fuel Liners to intervene and for trial, the parties having stipulated the facts in this case. The Plaintiff appeared by its counsel, Fred W. Phifer, and the Defendants appeared by their counsel, Henry A. Burgess, and both counsel having submitted their briefs and made oral arguments to the Court, and the Court having considered the briefs, oral arguments of counsel, the Stipulation of Facts, and the Interrogatories and Answers to the Interrogatories, and being duly and fully advised in the premises finds that Johnston Fuel Liners should be al-

lowed to intervene as a Defendant in this case, that its Answer may be filed herein, and that the pleadings may be amended to show it as a Defendant, and that the Wyoming Statutes under which the Plaintiff was organized were constitutional and valid.

IT IS THEREFORE HEREBY ORDERED that the Motion of Johnston Fuel Liners, a corporation, to intervene in this action is hereby granted, that its Answer shall be filed forthwith, and that title of this case is hereby amended to include it as a party defendant.

IT IS FURTHER ORDERED by the Court that the Plaintiff, its employees, agents, contractors, and cooperating parties such as the Soil Conservation Service of the United States Department of Agriculture may enter upon the lands of the Defendant, Associated Enterprises, and lands upon which the Defendant, Johnston Fuel Liners, runs cattle, and which are contained within the boundaries of the Toltec Watershed Improvement District for the purpose of carrying out foundation studies for a dam site, including the excavation of test pits, the drilling of test holes, and reasonable ingress and egress over and across the lands of the Defendants to and from the lands aforementioned.

Done in open court this 19 day of October, 1970.

VERNON BENTLEY
Judge

Approved:

FRED W. PHIFER
Attorney for Plaintiff

BURGESS, KENNEDY & DAVIS
by Henry A. Burgess
Attorneys for Defendants

IN THE DISTRICT COURT IN AND FOR ALBANY COUNTY, WYOMING

TOLTEC WATERSHED IMPROVEMENT DISTRICT,	)	
Plaintiff,	)	
vs.	)	**Civil Action No. 14417**
ASSOCIATED ENTERPRISES, INC., and JOHNSTON'S FUEL LINERS,	)	
Defendants.	)	

NOTICE OF APPEAL TO THE SUPREME COURT

Notice is hereby given that Associated Enterprises, Inc. and Johnston's Fuel Liners, Defendants above named, hereby appeal to the Supreme Court of the State of Wyoming, from that portion of an Order and Judgment entered in the above entitled case on October 19, 1970, ordering that the Plaintiff, if employees, agents, contractors, and cooperating parties such as the Soil Conservation Service of the United States Department of Agriculture, may enter upon the lands of the Defendant, Associated Enterprises, and lands upon which the Defendant, Johnston's Fuel Liners, runs cattle, and which are contained within the boundaries of the Toltec Watershed Improvement District,

for the purpose of carrying out foundation studies for a damsite, including the excavation of test pits, the drilling of test holes, and reasonable ingress and egress over and across the lands of Defendants to and from the lands before mentioned.

BURGESS, KENNEDY & DAVIS

By Henry A. Burgess
P. O. Box 728
Sheridan, Wyoming 82801

(Certificate of Service omitted in printing)

MANDATE OF AFFIRMANCE

In the Supreme Court)
of the)
State of Wyoming)

To the Honorable the District Court of the County of Albany, Greeting:

WHEREAS, Associated Enterprises, Inc., and Johnston Fuel Liners, on the 23rd day of December A. D. 1970, filed a Record on Appeal in the Supreme Court of the State of Wyoming to obtain the reversal of a judgment rendered by you on the 19th day of October, A. D. 1970, and entered on the 19th day of October, A. D. 1970, in a cause pending before you wherein Toltec Watershed Improvement District was plaintiff and Associated Enterprises, Inc., and Johnston Fuel Liners, were defendants; and

WHEREAS, The following proceedings were had and entered in the Supreme Court in said cause on the 22nd day of November, A. D. 1971, to-wit:

"This cause having been heretofore taken under advisement, and the court, being now fully advised in the premises, does say and find there is no reversible error in the record of the proceedings of the District Court of Albany County.

It is therefore Ordered and Adjudged, for the reasons stated in the opinion herein this

day delivered and filed, that the judgment of the District Court be, and the same is hereby, affirmed. It is further Ordered that the costs of this appeal be taxed against the appellants; and the court doth certify there is reasonable cause for the appeal."

COSTS IN THE SUPREME COURT:

Brief of Appellee, 22 pages @ 75¢ per page for five copies ----------$16.50

NOW, THEREFORE, You are commanded without delay to carry into execution and effect the judgment so as aforesaid rendered by you, in the manner provided by law.

WITNESS, The Honorable John J. McIntyre, Chief Justice of said Supreme Court, and the Seal thereof, at Cheyenne, this 6th day of January, A. D. 1972.

ANN OELAND
Clerk

(Seal)

IN THE DISTRICT COURT IN AND FOR ALBANY COUNTY, WYOMING

ASSOCIATED ENTERPRISES, INC., and JOHNSTON FUEL LINERS,	)
Appellants, (Defendants below),	)
-vs-	)
TOLTEC WATERSHED IMPROVEMENT DISTRICT,	)
Appellee, (Plaintiff below).	)

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that all of the appellants above named hereby appeal to the Supreme Court of the United States from the final judgment of the Wyoming Supreme Court's affirming decision entered in Case No. 3958 on November 22, 1971.

This appeal is taken pursuant to United States Code Title 28, Section 1257(2).

ELLSWORTH E. LONABAUGH
Attorney for Appellants
P. O. Box 728
Sheridan, Wyoming 82801

(Certificate of Service omitted in printing)

Supreme Court of the United States

No. 71-1069

Associated Enterprises, Inc., and
Johnston Fuel Liners,

Appellants,

v.

Toltec Watershed Improvement
District

APPEAL from the Supreme Court of the State of Wyoming.

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted.

June 12, 1972

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No._____

ASSOCIATED ENTERPRISES, INC. and JOHNSTON FUEL LINERS,

Appellants,

- vs -

TOLTEC WATERSHED IMPROVEMENT DISTRICT,

Appellee.

APPEAL FROM THE SUPREME COURT OF WYOMING

JURISDICTIONAL STATEMENT

Appellants submit herewith their jurisdictional statement as required by Rule 15 of the Rules of the Supreme Court of the United States.

OPINION BELOW

This appeal is from the opinion of the Wyoming Supreme Court in the case of Associated Enterprises, Inc. and Johnston Fuel Liners, Appellants (Defendants below), vs. Toltec Watershed Improvement District, Ap-

pellee (Plaintiff below), reported officially at 490 P.2d 1069 (Wyo. 1971), and attached hereto as Appendix A.

GROUNDS OF JURISDICTION

I. Nature of the Proceeding and Statute Pursuant to which it was Brought.

This was a state district court civil action brought by the Appellee herein, Toltec Watershed Improvement District, for a right of entry upon Appellant's lands pursuant to the provision of Section 1-794 of the Wyoming Statutes 1957. The Toltec Watershed Improvement District can exercise a right of entry upon the Appellant's land only if the statutes (Wyoming Statutes 1957, Sections 41-354.1 - 41-354.26) under which it was created are constitutional.

These statutes limit the voting franchise to property owners and give more weight to the vote of large property owners than to small property owners.

From a Judgment holding that the Watershed Improvement District Statutes were constitutional and authorizing the Appellee to enter upon Appellants' land, the Appellants appealed to the Wyoming Supreme Court, which ruled the statutes constitutional and affirmed the lower Court.

II. Entry of the Opinion Sought to be Reviewed.

The opinion sought to be reviewed was entered November 22, 1971. The Notice of Ap-

peal to the Supreme Court of the United States, attached hereto as Appendix B, was filed on February 15, 1972 in the District Court in and for Albany County, Wyoming.

III. Statute Conferring Jurisdiction on this Appeal.

The jurisdiction of the Supreme Court of the United States to hear this appeal rests upon 28 U.S.C. Section 1257(2).

IV. Cases Sustaining Jurisdiction.

Kramer vs. Union Free School District, 395 U.S. 621, 23 L.Ed.2d 583, 70 S.Ct. 652; Ciprianо vs. City of Houma, 395 U.S. 701, 23 L.Ed.2d 647, 89 S.Ct. 1897; City of Phoenix, Arizona vs. Kolodziejski, 399 U.S. 204, 26 L.Ed.2d 523, 90 S.Ct. 1990, were all cases wherein the State's highest Court upheld the constitutionality of limiting the voter franchise to property owners, and he same were reversed by this Court after holding the matter was properly before this Court on appeal. Gray vs. Sanders, 372 U.S. 368, 9 L.Ed.2d 821, 83 S.Ct. 801; Westbury vs. Sanders, 376 U.S. 368, 11 L.Ed.2d 481, 84 S.Ct. 526; Reynolds vs. Sims, 377 U.S. 533, 12 L.Ed.2d 506, 84 S.Ct. 1362; Avery vs. Midland County, Texas, 390 U.S. 474, 20 L.Ed.2d 45, 88 S.Ct. 1114; Hadley vs. Junior College District of Metropolitan Kansas City, 397 U.S. 50, 25 L.Ed.2d 45, 90 S.Ct. 790, were all cases wherein the State's highest Court upheld the constitutionality of a statute which permitted the votes of some citizens to have more weight than others and the same were reversed by

this Court as being violative of the one man-one vote concept of the Fourteenth Amendment to the United States Constitution.

V. The State Statute Involved.

This case involves the Fourteenth Amendment to the Constitution of the United States.

The Wyoming state statutes involved in this appeal are those creating Watershed Improvement Districts, Wyoming Statutes 1957, Sections 41-354.1 - 41-354.26. The portions of such statutes which are pertinent to this appeal are set out in Appendix C, and the statutes are set out in toto in Appendix D.

QUESTIONS PRESENTED

The facts in this case show that in the creation of the Toltec Watershed Improvement District, only landowners were given the voting franchise and further, that the votes of the landowners were weighted by the fact that approval of a majority of the acreage was required by statute. The Watershed Improvement District statutes, and the Wyoming Supreme Court's decision that they are constitutional present two principal questions:

1) Whether or not the limiting of the voting franchise to property owners in the creation and maintenance of a watershed improvement district violates the Equal Protection clause of the Fourteenth Amendment in that an unreasonable, arbitrary and capricious voting classification is created; and

2) Whether or not the weighting of the votes in a watershed improvement district election by requiring a majority of the acreage is a debasement of the votes of smaller property owners and is violative of the one man-one vote doctrine of the Fourteenth Amendment.

STATEMENT OF THE CASE

I. Background.

The Appellee, Toltec Watershed Improvement District, was organized under the provisions of Wyoming Statutes 1957, Sections 41-354.1 - 41-354.26 by a referendum held on May 12, 1969. At this referendum, the voting franchise was limited to landowners as defined by the statutes. As is required by statute, a majority of the landowners, as well as a majority of the acreage, voted in favor of the Watershed Improvement District.

On June 22, 1970 the Toltec Watershed Improvement District instituted a suit against one of the Appellants herein, Associated Enterprises, Inc., seeking a right of entry upon the Appellant's land for the purpose of carrying out foundation studies for a dam site, including the excavation of test pits, the drilling of test holes and reasonable ingress and egress over the lands in order to determine the feasibility of a reservoir on the North Laramie River in the northern portion of Albany County, Wyoming; said reservoir to cover a portion of the Appellant's land.

Appellant, Johnston Fuel Liners, who had leased from Associated Enterprises the land which was to underlie the proposed reservoir, made a Motion to Intervene in the suit, and such Motion was granted.

The Trial Court rejected Appellants' argument that the statutes were unconstitutional, and found that the Wyoming Statutes under which the Toltec Watershed Improvement District was organized were constitutional and valid, and granted to Toltec the right of entry upon the Appellants' land. The Appellants appealed the Judgment of the District Court to the Wyoming Supreme Court.

II. How the Federal Question was Raised.

The Appellant, Associated Enterprises, Inc., in its Answer to Toltec's Complaint, set forth the defense that the Watershed Improvement District was not a validly organized watershed improvement district, as it was created and organized under a statute of Wyoming which violated the Wyoming Constitution and the United States Constitution and that such statute violated the Equal Protection clause of the Fourteenth Amendment. In its decision, the Supreme Court of the State of Wyoming based its entire decision on the constitutionality of such statutes. The Court said at 490 P.2d 1070:

> The only question presented for our consideration is whether the Wyoming law for the creation of watershed improve-

ment districts (Sections 41-354.1 through 41-354.26, W.S. 1957, 1971 Cum.Supp.) is constitutional.

In its brief and oral argument before both lower Courts, the Appellants urged that the statutes which provided for the creation of Watershed Improvement Districts were unconstitutional since they violated the one man-on vote concept and created an unreasonable voting classification by denying the franchise to non-landowners.

III. How the Lower Court Handled the Constitutional Question.

The Wyoming Supreme Court in holding that the statutes in question were constitutional, relied upon the governmental vs. proprietary test. The Wyoming Court held that the functions of a watershed improvement district were proprietary and hence the one man-one vote concept of the Fourteenth Amendment was not applicable. In so holding, the Court turned a deaf ear to the dictates of the cases of Hadley vs. Junior College District of Metropolitan Kansas City, supra, and Avery vs. Midland County, Texas, supra.

The Court in citing the 1902 case of Mound City Land & Stock Co. vs. Miller, 170 Mo. 240, 70 S.W. 721, held that the affairs of a watershed improvement district were similar to those of a private corporation and hence the weighting of the votes by acreage was constitutionally permissable. By so doing the Court

ignored the fact that a watershed improvement district is a governmental body created by the electoral process. Under the Hadley vs. Junior College District of Metropolitan Kansas City case, supra, these two factors cannot be so lightly disregarded.

Even though the Appellants in both their oral and written arguments extensively discussed the constitutional issue of limiting the voting franchise to landowners, the opinion of the Wyoming Supreme Court fails to consider this issue. Thus impliedly the holdings in the Kramer vs. Union Free School District, supra, and Cipriano vs. City of Houma, supra, were determined to be inapplicable.

The Wyoming Supreme Court also held that the Appellants failed in their burden of proof contrary to this Court's rulings in Kramer vs. Union Free School District, supra, which stated that when the voting franchise is limited to a certain class the presumption of constitutionality of the statute is not applicable and the Appellee has the burden of proof.

FEDERAL QUESTIONS ARE SUBSTANTIAL

I. The Questions are Established as Being Federal.

The questions presented by this appeal have been considered by this Court on several previous occasions, and this Court has uniformly condemned statutes which limit the voting franchise to property owners, and

which dilute the votes of smaller property owners.

The Wyoming Statute grants the voting franchise to only property owners. Irregardless of the number of acres he may have under his management and irrespective of the tremendous effect an improvement district may have upon his mode of living, a lessee is summarily denied his Constitutional right to vote.

In addition, the Wyoming Supreme Court gave its approval to a statute which inherently gives more weight to the votes of larger property owners than to the votes of the small property owners. Such dilution of a man's vote has been held a violation of the Equal Protection clause of the Fourteenth Amendment. Hadley vs. Junior College District of Metropolitan Kansas City, supra.

The Wyoming Supreme Court has held here that non-property owners are subtantially less interested in the creation and maintenance of a watershed improvement district than proprty owners. On this point, the language to the United States Supreme Court used in the case of City of Phoenix vs. Kolodziejski, supra, at 994, is especially pertinent:

> The difference between the interest of property owners and the interest of non-property owners are not sufficiently substantial to justify exclusion of the latter from the franchise.

This Court has consistently ruled that the theories upon which the Wyoming Supreme

Court based its decisions are not valid, and that statutes which arbitrarily limit the voting franchise and dilute a man's vote on the basis of his wealth violate the Fourteenth Amendment.

II. The Questions Are Substantial.

The limiting of the voting franchise to certain people is closely scrutinized by the Courts, and the general presumption of the constitutionality afforded most statutes is not applicable when the statute denies the right to vote to a certain group of people. Kramer vs. Union Free School District, supra.

Once the election process has been chosen the voting franchise may not be limited in any manner which is inconsistent with the Equal Protection clause of the Fourteenth Amendment. Kramer vs. Union Free School District, supra.

When the voting franchise is limited to a certain class, the Court will look to see whether all those excluded are in fact substantially less interested or affected than those the statute includes. The limiting of the voting franchise to property owners is a denial of equal protection. Kramer vs. Union Free School District, supra; Cipriano vs. City of Houma, supra; City of Phoenix vs. Kolodziejski, supra.

No right is more precious in a free country than that of having a voice in the election process and the vote of one man is to be as

much as that of another. Westbury vs. Sanders, supra.

Considerations of area provide insufficient justification for deviations from the one man-one vote rule. Reynolds vs. Sims, supra.

The constitutional right to vote does not depend upon the purpose of the election. Hadley vs. Junior College District of Metropolitan Kansas City, supra.

The right to vote in a governmental body election such as a watershed improvement district and the right to have the vote of one man equal to that of another are substantial federal questions.

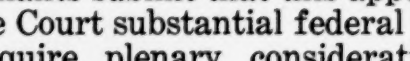
III. The Questions Are Timely.

This case came before the Wyoming Supreme Court in October, 1971 and at this time the Court had access to all of the decisions of this Court concerning the voter classifications and the one man-one vote concepts of the Fourteenth Amendment.

CONCLUSION

Appellants submit that this appeal brings before the Court substantial federal questions which require plenary consideration, with briefs on the merits and oral arguments, for their resolution.

Respectfully submitted,



ELLSWORTH E. LONABAUGH
Member of the Bar of the
Supreme Court of the
United States
Attorney for all Appellants

CERTIFICATE OF SERVICE

I hereby certify that on this 17 day of ebruary, 1972, three copies of Appellants' risdictional Statement were served by mail- g, first class postage prepaid, under Rule (1), to Mr. Fred Phifer, Attorney at Law, heatland, Wyoming 82201. I further certify at all parties required to be served have been rved.

Ellsworth E. Lonabaugh

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Attorney for all Appellants

APPENDIX A

In the Supreme Court, State of Wyoming
OCTOBER TERM, A.D. 1971
NOV. 22, 1971

ASSOCIATED ENTERPRISES, INC., and JOHNSTON FUEL LINERS,	)	
Appellants (Defendants below),	)	
v.	)	No. 3958
TOLTEC WATERSHED IMPROVEMENT DISTRICT,	)	
Appellee (Plaintiff below).	)	

Appeal from the District Court of Albany County, the Honorable Vernon G. Bentley, Judge.

Henry A. Burgess, of Burgess, Kennedy & Davis, Sheridan, for appellants.

Fred W. Phifer, Wheatland, for appellee.

Before McINTYRE, C.J., and PARKER, McEWAN, and GRAY, JJ.

Chief Justice McINTYRE delivered the opinion of the court.

Appellants are appealing from a judgment of the district court which authorizes Toltec Watershed Improvement District to enter upon lands of defendant-appellants for the purpose of carrying out foundation studies for a dam site.

The only question presented for our consideration is whether the Wyoming law for the creation of watershed improvement districts (§§ 41-354.1 through 41-354.26, W.S.1957, 1971 Cum.Supp.) is constitutional. Appellants are contending this law is unconstitutional because it offends the "one man, one vote" concept of equal protection under the Wyoming and United States constitutions.

Governmental v. Proprietary

We think it will help to understand the problem here involved if we keep the distinction between governmental and proprietary functions of legal subdivisions. In Wyoming we have always recognized such a distinction in dealing with the matter of tort liability of municipal corporations.

Cases which recognize this distinction are so numerous we will not pretend to review them. Instead, we adopt the general statement of rule as set forth in 63 C.J.S. Municipal Corporations § 746, p. 30, in these words:

> "* * * the great weight of authority holds * * * that a municipal corporation has a dual character, the one public and the other private, and exercises correspond-

> ingly twofold functions and duties, one class consisting of those acts performed by it in the exercise of delegated sovereign powers for the benefit of the people generally, as an arm of the state, enforcing general laws made in pursuance of the general policy of the state, and the other consisting of acts done in the exercise of the power of the municipal corporation for its own benefit, or for the benefit of its citizens alone, or the citizens of the municipal corporation and its immediate locality."

On pages 30 and 32 of the text, it is explained that functions falling in the first class are political and governmental; and that the corporation stands on the same footing with a private corporation in the exercise of functions comprising the second class—that is—in the exercise of purely proprietary functions, or the doing of those things which relate to special or private corporate purposes.

Although the act under consideration does not state that a watershed improvement district is a body corporate and politic, it does set forth that watershed improvement districts are formed as subdistricts of soil and water conservation districts.[1] And, the law pertaining to soil and water conservation districts states that a "conservation district" means a governmental subdivision of the state and a body corporate and politic.[2]

---

[1]Section 41-354.3, W.S.1957, 1971 Cum.Supp.
[2]Section 11-235(a), W.S.1957, 1971 Cum.Supp.

Without reviewing the watershed improvement districts law section by section, we can state categorically that the functions of such districts are proprietary and in the nature of special or private corporation purposes. The districts do not exercise delegated sovereign powers for the benefit of people generally.

We need to make it clear that we are not saying a watershed improvement district is not a governmental entity. We merely say its functions are primarily proprietary and not governmental.

Appellants' Burden

This brings us to a restatement of the rule long adhered to by this court concerning the burden of proof when it is claimed that a law is unconstitutional. A law will not be construed to be unconstitutional unless its unconstitutionality is clear and beyond reasonable doubt; and the party who assails the validity of a statute has the burden of proving his contention.[3]

We repeat and apply the foregoing rule because appellants have cited only cases which involve elections to state office, county office, city office, or offices having to do with education. We need not dispute that the one man, one vote concept of equal protection has been

[3]Albert v. State, Wyo., 466 P.2d 826, 827, reh.den. 468 P.2d 968; Weiss v. State ex rel. Cardine, Wyo., 455 P.2d 904, 907, cert. den. 90 S.Ct. 1815, 398 U.S.927, 26 L.Ed.2d 89; City of Rawlins v. Frontier Refining Company, Wyo., 396 P.2d 740, 744, Kuntz v. Kinne, Wyo., 395 P.2d 286, 288-289; Brinegar v. Clark, Wyo., 371 P.2d 62, 64.

applied to such elections. These elections all have to do with the election of persons to offices where political and governmental functions are extensively exercised.[4]

Typical of the authority relied on by appellants is the case of Avery v. Midland County, Texas, 88 S.Ct. 1114, 1121, 390 U.S. 474, 20 L.Ed2d 45, where the court made it clear the body involved was a unit of local government "with general governmental powers" over the county's entire area. Also, Gray v. Sanders, 83 S.Ct. 801, 803, 372 U.S. 368, 9 L.Ed2d 821, which involved a state-wide election. See also Abate v. Mundt, 9 S.Ct. 1904, 1905, ___ U.S. ___, 29 L.Ed2d 398, which had to do with a county board of supervisors consisting of the supervisors of the county's five towns.

Appellants cite no precedent for applying the one man, one vote rule in connection with the establishment and regulation of such entities as watershed improvement districts, soil conservation districts, and irrigation districts, where functions are special and akin to private corporation purposes. We therefore say appellants have failed in their burden of

[4]No citation of authority is necessary for the proposition that states and municipal corporations perform political and governmental functions. Also, education is a matter of purely public concern; and in the establishment and regulation of schools, municipalities act in their governmental and not their private capacity. Sanders v. City of Long Beach, 54 Cal.App.2d 651, 129 P.2d 511; Nabell v. City of Atlanta, 33 Ga.App. 545, 126 S.E. 905; Jones v. City of Armory, 184 Miss. 161, 185 So. 237; Cobb v. Malden, C.A.Mass., 202 F.2d 701; and Fulgoni v. Johnston, 302 Mass. 421, 19 N.E.2d, 542.

showing that the watershed improvement districts law is unconstitutional.

Moreover, it makes sense not to attempt to apply the one man, one vote concept in the establishment and regulation of districts such as a watershed improvement district. The owners of land within the boundaries of a proposed watershed district are the persons primarily concerned. It is, however, the board of supervisors of the soil conservation district which determines whether a watershed district is needed. See § 41.354.8, W.S.1957, 1971 Cum. Supp.

In order "to assist the board of supervisors in this determination," a referendum is required; and only the owners of land within the proposed district vote in the referendum. See § 41.354.9B. The board of supervisors cannot determine that a watershed district is feasible unless a majority of the land owners vote for it **and** unless those voting for the district represent a majority of the acreage contained in the proposed district. See § 41-354.10.

Thus, it can be seen, in matters pertaining to the referendum and affairs of a watershed improvement district, there is a similarity to the manner in which the affairs of a private corporation are administered.

In Mound City Land & Stock Co. v. Miller, 170 M. 240, 70 S.W. 721, 727, it was said:

> "The fact that each owner is entitled to one vote for every acre of land owned by

> him creates no more infirmity in the law than the right of each stockholder of any corporation to cast as many votes as he owns shares of stock renders such laws invalid. In both instances the majority in interest, instead of the majority in number, controls; and who shall say such laws are not just?"

For other statements to the same effect, see State ex rel. Harris v. Hanson, 80 Neb. 724, 115 N.W. 294, 298, same result reached on rehearing 80 Neb. 738, 117 N.W. 412, 415-416; 25 Am Jur 2d Elections § 79, p. 771; and Annotation 82 L.Ed 259.

We are reminded that § 15.1-338, W.S.1957, C.1965, provides for protests and petitions pertaining to local improvement districts. If protests are filed by the legal owners of record of more than half of the area, the improvement shall be abandoned. On the other hand, if a petition for the improvement is signed by owners of 50% of the property, then the governing body shall proceed with the improvement.

The principle recognized in § 15.1-338 is not at all unusual. It is not essentially different from the principle on which the watershed improvement districts law is based.

Overreactions

The writer of this opinion believes there is sometimes a tendency for judges and courts to overreact to decisions of the United States Supreme Court. If we followed the course ad-

vocated by counsel for appellants in the instant case, we would be extending holdings of the United States Supreme Court beyond the limits involved in the decisions of that court.

For example, appellants rely heavily upon the case of Hadley v. Junior College Dist. of Metropolitan Kansas City, Missouri, 90 S.Ct. 791, 397 U.S. 50, 25 L.Ed2d 45, which did extend the one man, one vote rule to local school district elections. That, however, is not to say we should extend the rule even further by applying it to watershed improvement districts.

The limit of the court's holding in the **Hadley** opinion is pointed up by a dissenting opinion of Justice Harlan. At 90 S.Ct. 798, he expresses concern that the court has gone too far in extending the rule and expresses a fear that the rule may even be extended far enough down the scale of governmental bodies to include irrigation districts and air pollution control agencies.

Also, Chief Justice Burger concurred with Justice Harlan and stated, at 90 S.Ct. 802, that the need for more flexibility becomes greater as we proceed down the spectrum from the state legislature to the single-purpose local entity. He lamented the fact that the court had not indicated which nonpopulation interests may or may not be considered by a legislature in devising an apportionment scheme for a local, specialized unit of government.

It is apparent then, from the majority opinion and from the dissents in the **Hadley**

decision, that the one man, one vote rule has not been extended to a local, specialized unit of government such as a watershed improvement district. We reject the idea that we should so extend the rule. Accordingly, we fail to find the watershed improvement districts law unconstitutional and we will not disturb the judgment of the district court.

Affirmed.

APPENDIX B

IN THE DISTRICT COURT IN AND FOR ALBANY COUNTY, WYOMING

ASSOCIATED ENTERPRISES, INC., and JOHNSTON FUEL LINERS,

Appellants,
(Defendants below),

- vs -

TOLTEC WATERSHED IMPROVEMENT DISTRICT,

Appellee,
(Plaintiff below).

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that all of the Appellants above named hereby appeal to the Supreme Court of the United States from the final judgment of the Wyoming Supreme Court's affirming decision entered in Case No. 3958 on November 22, 1971.

This appeal is taken pursuant to United States Code Title 28, Section 1257(2).

/s/ Ellsworth E. Lonabaugh
ELLSWORTH E. LONABAUGH
Attorney for all Appellants
P. O. Box 728
Sheridan, Wyoming 82801

CERTIFICATE OF SERVICE

I, ELLSWORTH E. LONABAUGH, attorney for Appellants in the above entitled and numbered cause, hereby certify that on the 14th day of February, 1972 I served a true and correct copy of a Notice of Appeal to the Supreme Court of the United States by placing the same in the United States mail, postage prepaid at Sheridan, Wyoming, and correctly addressed to:

Mr. Fred Phifer
Attorney at Law
Wheatland, Wyoming 82201

/s/ Ellsworth E. Lonabaugh
ELLSWORTH E. LONABAUGH

APPENDIX C

PERTINENT SECTIONS OF THE WYOMING WATERSHED IMPROVEMENT DISTRICT STATUTES

Wyoming Statutes 1957, Section 41-354.1(c):

> "Landowner" means any person, firm or corporation holding title to, or occupying under a contract of purchase, any land lying within a watershed improvement district organized or proposed to be organized under the provisions of this act.

Wyoming Statutes 1957, 41-354.5:

> PETITION FOR ESTABLISHMENT — FILING GENERALLY; CONTENTS;

> COPY TO BE FURNISHED SOIL AND WATER CONSERVATION COMMITTEE. — When a majority of the LANDOWNERS in the proposed district, desire to form a watershed improvement district, they shall file a petition with the board of supervisors of the soil and water conservation district in which the proposed watershed improvement district be organized to function in the area described in the petition. Such petition shall set forth the boundaries of the proposed district, the number of acres of land involved, the reasons for requesting creation of such district, and the proposed name of such watershed improvement district. A copy of such petition shall be furnished to the state soil and water conservation committee. (Emphasis added)

Wyoming Statutes 1957, 41-354.9(b) states in part:

> All OWNERS of land lying within the boundaries of the proposed district, as determined by the board of supervisors, shall be eligible to vote in the referendum. Only such OWNERS of lands shall be eligible to vote. (Emphasis added)

Wyoming Statutes 1957, Section 41-354.14(d) provides:

> If two-thirds of the votes cast, which VOTES REPRESENT A MAJORITY OF THE ACREAGE CONTAINED IN THE WATERSHED IMPROVEMENT DIS-

TRICT, are in favor of the proposed bond issue, such bonds shall be authorized and may be issued. (Emphasis added)

Wyoming Statutes 1957, 41-354.12(c) states:

Nominating petitions may be filed with the board of supervisors to nominate candidates for directors of the watershed improvement district. No such nominating petition shall be accepted by the board of supervisors unless it shall be signed by ten (10) or more OWNERS of land lying within the boundaries of such watershed improvement district, or by a majority of such OWNERS if there be less than ten (10). Such OWNERS may sign more than one such nominating petition to nominate more than one candidate for director. No person shall be eligible to be a director of a watershed improvement district who is not an OWNER of land within the watershed improvement district in which he seeks election. (Emphasis added)

Wyoming Statutes 1957, Section 41-354.10 provides in part:

. . . provided, however, that the board of supervisors shall not have authority to determine that the operation of the watershed improvement district is administratively practicable and feasible unless at least a majority of the votes cast in the referendum, which affirmative votes REPRESENT A MAJORITY OF THE ACREAGE CONTAINED IN THE PRO-

POSED WATERSHED IMPROVEMENT DISTRICT, FAVOR CREATION OF THE WATERSHED IMPROVEMENT DISTRICT. (Emphasis added)

APPENDIX D

WYOMING WATERSHED IMPROVEMENT DISTRICTS STATUTES

Wyoming Statutes 1957, Sections 41-354.1 - 41-354.26.

CHAPTER 6.1.

WATERSHED IMPROVEMENT DISTRICTS

§ **41-354.1. Definitions.** — A "Director" means a director of a watershed improvement district, and "board of directors" means the governing body of a watershed improvement district.

B. "Supervisor" means a supervisor of the soil and water conservation district in which a watershed improvement district is situated; and "board of supervisors" means the governing body of the soil and water conservation district in which a watershed improvement district is situated.

C. "Landowner" means any person, firm or corporation holding title to, or occupying under a contract of purchase, any land lying within a watershed improvement district organized or proposed under the provisions of this act. [§§ 41-354.1 to 41-354.26].

D. "Due notice" means notice published at least twice, with an interval of at least six (6)

days between the two publication dates, in a newspaper of general circulation within the boundaries of the proposed or organized district, and by posting at five (5) conspicuous places within the organized or proposed district, such posting to include, where possible, posting at public places where it may be customary to post notices concerning county or municipal offairs generally. The notice of any hearing, election or referendum required to be held under this act shall fix the time, place and purpose thereof, which time shall be not less than ten (10) or more than fifteen (15) days after the first publication or first posting of such notice. At any hearing held pursuant to such notice, at the time and place designated in such notice, adjournment may be made from time to time without the necessity of renewing such notice for such adjourned dates. (Laws 1961, ch. 215, § 1.)

§ **41-354.2. Purposes of act.** — The purposes of this act [§§ 41-354.1 to 41-354.26] are to provide for the prevention and control of erosion, floodwater and sediment damages, and the storage, conservation, development, utilization, and disposal of water, and thereby to preserve and protect land and water resources, and protect and promote the health, safety, and general welfare of the people of this state. (Laws 1961, ch. 215, § 2.)

§ **41-354.3. Formation.** — Watershed improvement districts may be formed as subdistricts of soil and water conservation districts

as herein provided for the development and execution of plans and projects relating to any of the purposes set forth in section 2 [§ 41354.2]. (Laws 1961, ch. 215, § 3.)

§ 41-354.4. Area. — The land area embraced in a watershed improvement district must lie within the same or adjoining watershed or subwatershed areas. A watershed improvement district may embrace land lying in one or more soil and water conservation districts. Land lying within the boundaries of one watershed improvement district shall not be included in another watershed improvement district. (Laws 1961, ch. 215, § 4.)

§ 41-354.5. Petition for establishment — Filing generally; contents; copy to be furnished soil and water conservation committee. — When a majority of the landowners in the proposed district, desire to form a watershed improvement district, they shall file a petition with the board of supervisors of the soil and water conservation district in which the proposed watershed improvement district is situated askng that a watershed improvement district be organized to function in the area described in the petition. Such petition shall set forth the boundaries of the proposed district, the number of acres of land involved, the reasons for requesting creation of such district, and the proposed name of such watershed improvement district. A copy of such petition shall be furnished to the state soil and water conservation committee. (Laws 1961, ch. 215, § 5.)

§ **41-354.6. Same—Establishment in more than one soil and water conservation district.** —If a proposed watershed improvement district is situated in more than one soil and water conservation district, copies of such petition shall be presented to the board of supervisors of all the soil and water conservation districts in which any part of the proposed watershed improvement district is situated, and the supervisors of all such soil and water conservation districts shall act jointly as a board of supervisors with respect to all matters concerning such watershed improvement district, including its organization. Such watershed improvement district shall be organized in like manner and shall have the same powers and duties as a watershed improvement district situated entirely in one soil and water conservation district. (Laws 1961, ch. 215, § 6.)

§ **41-354.7. Same—Hearing; notice.** — A. Within thirty days after such petition has been filed with or presented to the board of supervisors, it shall cause due notice to be given of a public hearing upon the practicability and feasibility of creating the proposed watershed improvement district. All owners of land within the proposed watershed improvement district and all other interested parties shall have the right to attend such hearing and to be heard. The state soil and water conservation committee may furnish advice and assistance to the board of supervisors in connection with such hearing. If it appears upon the hearing

that any land included in the petition will not be benefited by its inclusion within the proposed watershed improvement district, the board of supervisors shall exclude such land from the proposed watershed improvement district.

B. If it appears upon the hearing that it may be desirable to include within the proposed watershed improvement district territory outside of the area described in such petition, the hearing shall be adjourned and due notice of a further hearing shall be given throughout the entire area considered for inclusion in such district, and a further hearing shall be held. After final hearing, if the board of supervisors determines, upon the facts presented at the hearing and upon other available information, that there is need, in the interest of the public health, safety and welfare for such a district to function in the territory considered at the hearing, it shall make and record such determination and shall define by metes and bounds or by legal sub-divisions, the boundaries of such district. The board of supervisors, in making such determination, may advise and consult with the state soil and water conservation committee.

C. If the board of supervisors determines after the hearing that there is no need for such a district to function in the territory considered at the hearing, it shall make and record such determination and shall deny the petition. (Laws 1961, ch. 215, §7.)

§ 41-354.8. **Referendum prerequisite to establishment—Generally.** — After the board of supervisors has made and recorded a determination that there is a need, in the interst of the public health, safety and welfare, for the creation of the proposed watershed improvement district, it shall consider the question whether the operation of such a district within the proposed boundaries with the powers conferred upon such district in this act [§§ 41-354.1 to 41-354.26] is administratively practicable and feasible. To assist the board of supervisors in this determination, the board shall, within not more than sixty days after entry of the finding that there is need for the organization of such a district and the determination of the boundaries of such district, hold a referendum within the proposed district upon the proposition of the creation of such district. Due notice of such referendum shall be given by the board of supervisors. Such notice shall state the date of holding the referendum, the hours of opening and closing the polls and shall designate one or more places within the proposed district as polling places. The board of supervisors shall appoint a polling superintendent and other necessary polling officers. (Laws 1961, ch. 215, § 8.)

§ 41-354.9. **Same—Voting; ballots; right of landowners to vote; proxies.**—A. The question to be voted on shall be submitted by ballots upon which the words "For creation of_____Watershed Improvement District" and "Against creation of_____

..Watershed Improvement District" shall appear, with a square before each proposition and a direction to insert an "X" mark in the square before one or the other of the propositions as the voter may favor or oppose creation of such district. The ballot shall set forth the boundaries of the proposed watershed improvement district as determined by the board of supervisors.

B. All owners of land lying within the boundaries of the proposed district, as determined by the board of supervisors, shall be eligible to vote in the referendum. Only such owners of lands shall be eligible to vote. Any such owner who is unable because of illness or absence from the district to appear at the polls, may appoint in writing on a form prescribed by the state soil and water conservation committee and acknowledged before a notary public or other officer authorized to administer oaths, an agent or proxy to cast a ballot for him. The appointment of agent or proxy shall be presented to the polling officers, and if it is found to be bona fide and in proper form, the holder thereof shall be allowed to vote in behalf of the owner executing the appointment. Prior to casting his ballot, each owner shall present to the polling officers an affidavit stating that he is an owner of land within the district and showing the number of acres he owns and his interest therein, and each agent or proxy shall present a similar affidavit executed by the landowner for whom he is voting. Each landowner shall

be entitled to one vote in the referendum. (Laws 1961, ch. 215, § 9.)

§ 41-354.10. **Same—Counting and recording votes; action upon results; certification of fact when created.**—The votes cast in the referendum shall be counted by the polling officers at the close of the polls and a report of the results, along with the ballots, shall be delivered to the polling superintendent, who shall certify the results to the board of supervisors; and the board shall then consider and determine whether the operation of the district within the defined boundaries is administratively practicable and feasible. If the board of supervisors shall determine that the operation of the watershed improvement district is not administratively practicable and feasible, it shall record such determination and deny the petition. If the board of supervisors shall determine that the operation of the watershed improvement district is administratively practicable and feasible, it shall declare the watershed improvement district to be created, provided, however, that the board of supervisors shall not have authority to determine that the operation of the watershed improvement district is administratively practicable and feasible unless at least a majority of the votes cast in the referendum, which affirmative votes represent [a] majority of the acreage contained in the proposed watershed improvement district, favor creation of the watershed improvement district. Upon declaring the watershed improvement district to be

created, the board of supervisors shall certify the fact of the creation of such district to the county clerk of the county or counties in which such district is situated, for recordation; and such watershed improvement district shall thereupon constitute a governmental subdivision of this state and a public body corporate and politic. After being recorded, the certificate of the board of supervisors shall be filed with the secretary of state, and a copy thereof shall be filed with the state soil and water conservation committee. (Laws 1961, ch. 215, § 10.)

§ **41-354.11. Inclusion of additional land; detaching land; change of boundaries; change of name.**—A. Petitions for including additional territory within an existing watershed improvement district may be filed with the board of supervisors, and in such cases the proceedings herein provided for with respect to petitions to organize watershed improvement districts shall be observed to the extent deemed practicable in acting upon petitions for such inclusion. In determining whether the operation of a watershed improvement district, including such additional territory, will be administratively practicable and feasible, the board of supervisors shall advise and consult with the directors of the existing watershed improvement district. Where the total number of owners of land in the area proposed for inclusion shall be less than ten (10), the petition may be filed when signed by a majority of the owners of land in such area, represent-

ing a majority of the acreage contained in such area, and in such case no referendum need be held. If the board of supervisors makes a determination in favor of the inclusion of additional territory, it shall certify the fact of such inclusion of additional territory to the county clerk of the county or counties in which the watershed improvement district is situated. After being recorded, the certificate of the board of supervisors shall be filed with the secretary of state and a copy thereof shall be filed with the state soil and water conservation committee.

B. The owner or owners of land which has not been, is not, and cannot be benefited by its inclusion in the watershed improvement district may petition the board of supervisors to have such land withdrawn. The petition shall describe such land and state the reasons why it should be withdrawn. A hearing shall be held within thirty (30) days after the petition is received. Due notice of such hearing shall be given by the board of supervisors. If it is determined by the board of supervisors that such land has not been, is not, and connot be benefited by its inclusion in the watershed improvement district, such land shall be withdrawn from the district. A copy of such determination and withdrawal shall be certified to the county clerk of each county in which any portion of such withdrawn land is situated. After being recorded, the certification shall be filed with the secretary of state and a copy

thereof shall be filed with the state soil and water conservation committee.

C. Petitions for a change in the boundaries of watershed improvement districts may be filed with the board or boards of supervisors of the soil and water conservation district or districts to be affected. The board of supervisors of the soil and water conservation district or joint board of supervisors if more than one soil and water conservation district is affected may require such hearings or referenda as it deems appropriate to enable it to make a determination as to the desirability of the proposed change. If the board of supervisors or joint board of supervisors makes a determination in favor of the change in boundaries, it shall certify the fact of such change to the county clerk of the county or counties in which such watershed improvement district is situated and shall notify the board of directors of the watershed improvement district, setting out in such notice the new boundaries of the district. After being recorded, the certificate of the board of supervisors shall be filed with the secretary of state and a copy thereof shall be filed with the state soil and water conservation committee.

D. Petitions for a change of name of a watershed improvement district may be submitted to the board or board of supervisors of the soil and water conservation district or districts in which the watershed improvement district is situated. If the board of supervisors

approves the change of name, it shall certify the fact of such change of name to the county clerk of the county or counties in which the watershed improvement district is situated and shall notify the board of directors of the watershed improvement district of such change. After being recorded, the certificate shall be filed with the secretary of state and a copy thereof shall be filed with the state soil and water conservation committee. (Laws 1961, ch. 215, § 11.)

§ **41-354.12. Board of directors—Eligibility; nominating petition; election; terms; officers.**—A. Within thirty days after a watershed improvement district is created, the board of supervisors shall cause an election to be held for the election of a board of directors of the watershed improvement district. Due notice of such election shall be given by the board of supervisors. The board of directors shall consist of five members. The first board of directors shall determine by lot from among its membership, two members to serve terms of one year, two members to serve terms of two years, and one member to serve a term of three years. Thereafter, as these initial terms expire, the members of the board of directors shall be elected for terms of three years. Vacancies occurring before the expiration of a term shall be filled for the unexpired term by appointment by the remaining members of the board of directors with the approval of the board of supervisors. The board of directors shall, under the supervision of the board of supervis-

ors, be the governing body of the watershed improvement district.

B. The board of directors shall annually elect from its membership a chairman, secretary, and treasurer. The treasurer shall execute a surety bond for the faithful performance of the duties of his office, which bond shall be approved by the board of directors. Any premium for such bond shall be paid by the watershed improvement district. The district shall be subject to an annual audit of its accounts by the state examiner.

C. Nominating petitions may be filed with the board of supervisors to nominate candidates for directors of the watershed improvement district. No such nominating petition shall be accepted by the board of supervisors unless it shall be signed by ten (10) or more owners of land lying within the boundaries of such watershed improvement district, or by a majority of such owners if there be less than ten (10). Such owners may sign more than one such nominating petition to nominate more than one candidate for director. No person shall be eligible to be a director of a watershed improvement district who is not an owner of land within the watershed improvement district in which he seeks election. (Laws 1961, ch. 215, § 12.)

§ 41-354.13. Same — Powers generally. — Under the supervision of the board of supervisors, the board of directors of a watershed improvement district shall have power to:

A. Levy and collect assessments for special benefits accruing to land, as hereinafter provided.

B. Acquire by purchase, exchange, lease, gift, grant, bequest, devise, or otherwise, any property, real or personal, or rights or interests therein, maintain, administer, and improve any such property; and sell, lease, or otherwise dispose of any such property in furtherance of the purposes and provisions of this act [§§ 41-354.1 to 41-354.26].

C. Exercise the power of eminent domain and in the manner provided by law for the condemnation of private property for public use.

D. Construct, improve, operate and maintain such structures as may be necessary for the performance of any authorized function of the watershed improvement district.

E. Borrow such money as is necessary to carry out any of the purposes and provisions of this act, and issue, negotiate, sell its bonds or other evidence of indebtedness as provided in section 14 [§ 41-354.14].

F. Cooperate with, and receive from or grant assistance to, towns, cities, counties, and state and federal agencies in carrying out the purposes and provisions of this act. (Laws 1961, ch. 215, § 13.)

§ 41-354.14. Same — Issuance of bonds. — A. Bonds authorized by section 13 [§ 41-354.13] shall not be issued until proposed by order or

resolution of the board of directors specifying the purpose for which the funds are to be used, the rate of interest the bonds are to bear, the amount of the proposed bond issue, terms of the bonds, and the proposed method of payment and redemption of the bonds prior to maturity. A copy of the order or resolution shall be certified to the board of supervisors.

B. The board of directors shall conduct a hearing on such proposal after due notice of such hearing has been given. If it appears that the proposal is within the scope and purpose of this act [§§ 41-354.1 to 41-354.26] and meets all other requirements of the law, the proposal shall be submitted to the landowners of the watershed improvement district by a referendum held under the supervision of the board of supervisors.

C. The provisions of sections 7, 8, 9, and 10 [§§ 41-354.7 to 41-354.10], as to notice and manner of holding a referendum in organizing a watershed improvement district shall be applicable to the referendum held under this section.

D. If two-thirds of the votes cast, which votes represent a majority of the acreage contained in the watershed improvement district, are in favor of the proposed bond issue, such bonds shall be authorized and may be issued.

E. Bonds authorized and issued shall bear interest at a rate not exceeding ten per centum (10%) per annum, payable annually, and shall be due and payable not more than fifty (50)

years from their dates. The form, terms, and provisions of such bonds, provision for their payment and provisions for their retirement and calling not inconsistent with law, shall be determined by the board of supervisors. Such bonds shall be exempt from all state, county, municipal, school, and other taxes imposed by a taxing authority of this state. (Laws 1961, ch. 215, § 14; 1971, ch. 254, § 37.)

The 1971 amendment increased the interest rate in subsection (E) from six percent to ten percent.

§ **41-354.15. Same—Per diem and mileage.**—Members of the board of directors shall receive no salaries, but such members may be entitled to expenses for meetings and travel in the performance of their duties as approved by the board of supervisors. (Laws 1961, ch. 215, § 15.)

§ **41-354.16. Hearing on proposed projects.**—Before any contract shall be let or work begun upon any improvement or project within the watershed improvement district, the cost of which cannot be exclusively financed by funds on hand, grants in aid, or financial assistance or gifts to the district, or before any contract may be entered into by the district with any governmental agency or body which will obligate the district to contribute financially beyond the extent of funds of the district then on hand, it shall be the duty of the board of directors to set a time and place within the district for a public hearing upon such proposal. Due notice of such hearing shall be given by the board of directors.

At the time and place fixed for such hearing any owner of land situated within the watershed improvement district, or any other interested person, may appear and be heard as to his objections to such proposal.

Following the public hearing the board of directors shall, by order or resolution, either affirm the proposal with or without modification or amendments, or disapprove the proposal. If the board of directors affirms the proposal, it shall determine the probable cost of and the proposed method of financing the improvement or project, the benefits to be derived therefrom, and whether the benefits will be conferred upon all land within the watershed improvement district or upon only certain land within in the district, in which latter case the land to be benefited shall be described as to boundaries, ownership, and approximate acreage. (Laws 1961, ch. 215, § 16.)

§ **41-354.17. Appointment of appraisers and appraisal of benefited property.** — If the board of directors determines that the proposed improvement or project should be constructed and that the costs thereof should be paid by special assessment against the land benefited by such improvement or project, it shall appoint three qualified and disinterested residents of the state to act as appraisers. The appraisers shall inspect the plans and specifications of the proposed improvement or project and examine all land likely to be benefited thereby. The appraisers shall make and file

with the board of directors a detailed report showing all tracts of land within the watershed improvement district found to be benefited, together with the acreage thereof, the name of the record owner of each tract, the amount each tract will be benefited, and the amount of assessment to be levied against each tract, which assessment against each tract shall be in proportion to the benefits accruing to such tract. Any necessary expenses connected with making the appraisal by the three appraisers shall be paid by the watershed improvement district. (Laws 1961, ch. 215, § 17.)

§ **41-354.18. Hearing on report of appraisers.**—Upon receiving the report of the appraisers the board of directors shall fix a time and place within the watershed improvement district for hearing any complaint that may be made regarding the benefits appraised to any tract of land or the assessment proposed to be levied against any tract of land. Due notice of such hearing shall be given by the board of directors. At the time and place fixed for such hearing the board of directors shall consider the report of the appraisers and consider and hear any objections filed or voiced thereto. The board of directors shall, by order or resolution, reject the report of the appraisers or accept the report and ratify it with or without modification or amendments. (Laws 1961, ch. 215, § 18.)

§ **41-354.19. Appeal from approval of project or determination of benefits or assess-**

ments.—Any owner of land or person having an interest therein upon which an assessment is proposed to be levied may, within thirty (30) days from such order or resolution of the board of directors accepting the report of the appraisers, file with the clerk of the district court a written notice making demand for trial by the court. The notice shall state definitely from what part of such order or resolution the appeal is taken and shall set forth any other objections of the apellant [appellant]. In case more than one appeal is taken, the court may, upon finding that the appeals may be consolidated without injury to the interests of anyone, consolidate and try the appeals together. Any hearing on appeal provided for herein in the district court shall be de novo, and the district court shall consider not only the question of procedure but also the merits of the point or points appealed from, including but not limited to eminent domain proceedings. Any appeal from a decision of the district court shall follow the usual rules of civil procedure.

If no appeal is taken within the time prescribed in this section from such order or resolution the board of directors accepting the report of the appraisers, or after the finding of the court in case an appeal is taken from such order or resolution of the board of directors, then such assessments shall be final and conclusive and shall constitute perpetual liens upon the land so assessed until they are fully paid. (Laws 1961, ch. 215, § 19.)

§ 41-354.20. **Assessment of benefits against land of state and its subdivisions.**—In case land belonging to the state, or a county, school district, or other public corporation is benefited by any improvement or project constructed under the provisions of this act [§§ 41-354.1 to 41-354.26], all of such benefits shall be assessed against such land and the assessments shall be paid by the proper authorities at the same time as the assessments are called and paid in the cases of private persons. (Laws 1961, ch. 215, § 20.)

§ 41-354.21. **Assessments generally.**—The board of directors shall, on or before the third Monday in July of each year, certify to the board of county commissioners of the county within the watershed improvement district in which assessed lands is located the amount of the annual installments of assessments against such land, together with a fair proportionate amount of the estimated operating and maintenance charges apportioned to such land for the next succeeding year. Thereupon the county commissioners shall certify to and deliver such assessment roll to the county assessor of such county and such county assessor shall extend the amounts so certified on the tax roll as a flat special assessmen against the land benefited. Such assessments shall be subject to the same interest and penalties in case of delinquency as in the case of general taxes, and shall be collected at the same time and in the same manner as in the case of generl taxes; provided, that such assessments shall

become due and payable only at such times and in such amounts as may be determined by the board of directors; and provided further, that any person having an interest in land assessed under this act [§§ 41-354.1 to 41-354.26] may at any time within thirty (30) days after the order of the board of directors has become final and effective as provided in section 19 [§ 41-354.19], pay to the tax collector the amount of the assessments against his land or any tract thereof, and said payment shall relieve said land from the lien of said assessments for the cost of the improvement or project.

The board of directors in making the annual assessments and levies as herein provided, shall take into account the maturing indebtedness for the ensuing year as provided in its contracts, the maturing of bonds and interest on all bonds, and deficiencies and defaults of prior years, and shall make ample provisions for the payment thereof; provided however, that no one yearly call for assessment by the board of directors shall be in an amount to exceed ten per centum (10%) of the actual amount necessary to defray the cost of the construction of such improvement or project. (Laws 1961, ch. 215, § 21.)

§ **41-354.22. Levy, collection and disposition of taxes and special assessments; expenditure of funds.**—It shall be the duty of the officer or body having authority to levy taxes within each county, to levy the taxes and special assessments as provided in this act [§§ 41-

354.1 to 41-354.26] and it shall be the duty of all county officials, charged with the duty of collecting taxes, to collect the taxes and special assessments as provided in this act in the time, form and manner and with like interest and penalties as city or county taxes are collected, and when collected to pay the same to the board of directors of the watershed improvement district ordering their levy and collection and the payments of such collections shall be made through the treasurer of the watershed improvement district and deposited in the depository thereof to the credit of such district. All expenditures of such funds shall be made by the board of directors upon order of the board, under the supervision of the board of supervisors. (Laws 1961, ch. 215, § 22.)

§ **41-354.23. Lien of assessment; collection of delinquent assessments.**—All taxes and assessments levied against any land under this act [§§ 41-354.1 to 41-354.26] together with all interest thereon and penalties for default in payment thereof, and all costs of collecting the same, shall, until paid, constitute a perpetual lien upon such land on a parity with the tax lien of general, state, county, city, town or school taxes and no sale of such land to enforce any general, state, county, city, town or school tax or other liens shall extinguish the perpetual lien of such taxes and assessments. If the taxes and assessments levied are not paid as herein provided, then such land shall be sold at the regular tax sale for the payment of said taxes and assessments, interest and

penalties, in the manner provided by the statutes of this state for selling real property for non-payment of general taxes. (Laws 1961, ch. 215, § 23.)

§ **41-354.24. Discontinuance of districts.**— A. At any time after five years from the organization of a watershed improvement district, ten or more landowners within the district, or if less than twenty landowners are involved, a majority of the landowners in such district, may file a petition with the board of supervisors, praying that the existence of the watershed improvement district be discontinued. The petition shall state the reasons for discontinuance, and that all maintenance and operation assurances and other obligations of the district have been met. A copy of such petition shall be furnished to the secretary of state and to the state soil and water conservaion committee.

B. After giving due notice of a hearing on such petition, the board of supervisors may conduct such hearing on the petition as may be necessary to assist it in making a determination.

C. Within sixty (60) days after the petition is filed, a referendum shall be held under the supervision of the board of supervisors substantially as provided for in section 8 [§ 41-354.8]. No informalities in the conduct of the referendum or in any matters relating to the referendum sh.ll invalidate it or its results if due notice of the referendum has been given.

D. If a majority of the votes cast in such referendum favor the discontinuance of the watershed improvement district, and the board of supervisors determines that all maintenance and operation assurances and other obligations of the district have been met, the watershed improvement district shall be discontinued. A copy of such determination and discontinuance shall be certified to the county clerk of the county or counties involved for recordation. After being recorded, the certification shall be filed with the secretary of state and a copy thereof shall be filed with the state soil and water conservation committee. (Laws 1961, ch. 215, § 24.)

§ **41-354.25. Supervision by state soil and water conservation committee upon discontinuance.**—If any soil and water conservation district in which a watershed improvement district is situated is discontinued, the state soil and water conservation committee shall thereafter serve in the same supervising capacity over the watershed improvement district as was theretofore served by the board of supervisors of such soil and water conservation district. (Laws 1961, ch. 215, § 25.)

§ **41-354.26. Existing water rights preserved.**—Nothing in this act [§§ 41-354.1 to 41-354.26] shall be so construed as to in any manner impair existing water rights, appropriations or priorities. (Laws 1961, ch. 215, § 26.)

MAY 5
MICHAEL RODAK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1069

ASSOCIATED ENTERPRISES, INC., and
JOHNSTON FUEL LINERS,
Appellants,

vs.

TOLTEC WATERSHED IMPROVEMENT DISTRICT,
Appellee.

APPEAL FROM THE SUPREME COURT OF WYOMING

MOTION TO AFFIRM

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To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Pursuant to Rule 16 of the Rules of the Supreme Court of the United States, Appellee moves to affirm the judgment in the above entitled action on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

This Court held in *Gordan v. Lance*, 91 S.Ct. 1889 at page 1891:

> "We conclude that the West Virginia Court's reliance on the Gray and Cipriano cases was misplaced. The defect this court found in those cases lay in the denial or dilution of voting power because of group

characteristics—geographic location and property ownership—that bore no valid relation to the interest of those groups in the subject matter of the election;"

The Wyoming Watershed Improvement District statutes as quoted by the Appellant in his Jurisdictional Statement limit the right to vote in all watershed referendums and elections to land owners. The referendum required for the formation of the watershed improvement district must pass by a majority of the votes, which affirmative votes represent a majority of the acreage contained in the district. The referendum required before bonds can be issued requires a two-thirds vote of the land owners which votes must represent a majority of the acreage contained in the district.

These restrictions bear a valid relation to the interest of those groups in the subject matter of the election. The land owners are the only ones who directly benefit and they are the only ones who pay. The acreage requirements merely insure that a group of numerically superior small land owners can not force a minority of large land owners into a watershed district with its attendant heavy economic burdens.

This Court held in *Vermillion Parish Police Jury v. Hebert,* Case No. 70-164 as reported in 40 Law Week at page 3143, that provisions of the Louisiana constitution and statutes requiring ownership of property and payment of taxes thereon as a condition precedent to voting are constitutional as applied to local road district-bond authorization elections and the judgment of the Louisiana Supreme Court was reversed.

Thus the equal protection clause is limited to elections of general public concern and it does not apply to local

single purpose districts whose nature is primarily proprietary rather than governmental.

Respectfully submitted,

FRED W. PHIFER
Member of the Bar of the
Supreme Court of the United
States
Attorney for Appellee

CERTIFICATE OF SERVICE

I hereby certify that on this _____ day of May, 1972, three copies of the Appellee's Motion to Affirm were served by mailing, first class postage prepaid, under Rule 33(1), to Ellsworth E. Lonabaugh, Attorney at Law, P. O. Box 728, Sheridan, Wyoming 82801 and Henry A. Burgess, Attorney at Law, P. O. Box 728, Sheridan, Wyoming 82801. I further certify that all parties required to be served have been served.

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Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT OF THE UNITED STATES
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APPEAL FROM THE SUPREME COURT OF WYOMING

BRIEF OF APPELLANTS

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OPINION OF WYOMING SUPREME COURT OFFICIALLY REPORTED AT 490 P.2d 1069 (1971)

STATEMENT OF GROUNDS FOR INVOKING THIS COURT'S JURISDICTION

This is an appeal from the Judgment and Mandate of the Wyoming Supreme Court entered in a cause drawing into question the validity of the Wyoming Statutes providing for the creation of a Watershed Improvement District as being repugnant to the Fourteenth Amendment of the Constitution of the United States. Appeal in such cases is provided for by 28 U.S.C.A. Sec. 1257(2).

The opinion sought to be reviewed was entered by the Wyoming Supreme Court on November 22, 1971. Notice of Appeal to the Supreme Court of the United States was filed February 15, 1972 in the District Court in and for Albany County, Wyoming.

The United States Supreme Court's jurisdiction is invoked on the ground that the Wyoming Statutes of 1957 relating to the creation and operation of Watershed Improvement Districts violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. Such statutes provide that only landowners may vote and the weight of the vote is determined by the number of acres owned in elections for the creation of

the district, for the election of members to the board of directors, the issuance of bonds, and the discontinuance of such a district.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Fourteenth Amendment, Section 1:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Wyoming Statutes 1957, Volume 9, Sections 41-354.1 through 41-354.26 (1971 Cumulative Supplement to Vol. 9 at pages 243 through 252) are involved. The pertinent sections of the Act are set forth here and the entire provisions of the Act appear as Appendix A to this brief.

> Sec. 41-354.1. **Definitions.** - C. "Landowner" means any person, firm or corporation holding title to, or occupying under a contract of purchase, any land lying

within a watershed improvement district organized or proposed to be organized under the provisions of this act. (Sec. 41-354.1 to 41-354.26).

Sec. 41-354.2. **Purposes of act.** - The purposes of this act)Sec. 41-354.1 to 41-354.26) are to provide for the prevention and control of erosion, floodwater and sediment damages, and the storage, conservation development, utilization, and disposal of water, and thereby to preserve and protect land and water resources, and protect and promote the health, safety, and general welfare of the people of this state. (Laws 1961, ch. 215, Sec. 2.)

Sec. 41-354.8. **Referendum prerequisite to establishment — Generally.** - After the board of supervisors has made and recorded a determination that there is a need, in the interest of public health, safety and welfare, for the creation of the proposed watershed improvement district, it shall consider the question whether the operation of such a district within the proposed boundaries with the powers conferred upon such district in this act (Sec. 41-354.1 to 41-354.26) is administratively practicable and feasible. To assist the board of supervisors in this determination, the board shall, within not more than sixty days after entry of the finding that there is need for the organization of such a district and the determination of the

boundaries of such district, hold a referendum within the proposed district upon the proposition of the creation of such district. Due notice of such referendum shall be given by the board of supervisors. Such notice shall state the date of holding the referendum, the hours of opening and closing the polls and shall designate one or more places within the proposed district as polling places. The board of supervisors shall appoint a polling superintendent and other necessary polling officers. (Laws 1961 ch. 215, Sec. 8.)

Sec. 41-354.9. **Same — Voting; ballots; right of landowners to vote; proxies.** - A. The question to be voted on shall be submitted by ballots upon which the words "For creation of_____ Watershed Improvement District" and Against _____ Watershed Improvement District" shall appear, with a square before each proposition and a direction to insert an "X" mark in the square before one or the other of the propositions as the voter may favor or oppose creation of such district. The ballot shall set forth the boundaries of the proposed watershed improvement district as determined by the board of supervisors.

B. All owners of land lying within the boundaries of the proposed district, as determined by the board of supervisors, shall be eligible to vote in the referendum. Only

such owners of lands shall be eligible to vote. Any such owner who is unable because of illness or absence from the district to appear at the polls, may appoint in writing on a form prescribed by the state soil and water conservation committee and acknowledged before a notary public or other officer authorized to administer oaths, an agent or proxy to cast a ballot for him. The appointment of agent or proxy shall be presented to the polling officers, and if it is found to be bona fide and in proper form, the holder thereof shall be allowed to vote in behalf of the owner executing the appointment. Prior to casting his ballot, each owner shall present to the polling officers an affidavit stating that he is an owner of land within the district and showing the number of acres he owns and his interest therein, and each agent or proxy shall present a similar affidavit executed by the landowner for whom he is voting. Each landowner shall be entitled to one vote in the referendum. (Laws 1961, ch. 215, Sec. 9.)

Sec. 41-354.10. **Same — Counting and recording votes; action upon results; certification of fact when created.** - The votes cast in the referendum shall be counted by the polling officers at the close of the polls and a report of the results, along with the ballots, shall be delivered to the polling

superintendent, who shall certify the results to the board of supervisors; and the board shall then consider and determine whether the operation of the district within the defined boundaries is administratively practicable and feasible. If the board of supervisors shall determine that the operation of the watershed improvement district is not administratively practicable and feasible, it shall record such determination and deny the petition. If the board of supervisors shall determine that the operation of the watershed improvement district is administratively practicable and feasible, it shall declare the watershed improvement district to be creatd and provided, however, that the board of supervisors shall not have authority to determine that the operation of the watershed improvement district is administratively practicable and feasible unless at least a majority of the votes cast in the referendum, which affirmative votes represent (a) majority of the acreage contained in the proposed watershed improvement district, favor creation of the watershed improvement district. Upon declaring the watershed improvement district to be created, the board of supervisors shall certify the fact of the creation of such district to the county clerk of the county or counties in which such district is situated for recordation; and such watershed improve-

ment district shall thereupon constitute a governmental subdivision of this state and a public body corporate and politic. After being recorded, the certificate of the board of supervisors shall be filed with the secretary of state, and a copy thereof shall be filed with the state soil and water conservation committee. (Laws 1961, ch. 215, Sec. 10.)

QUESTIONS PRESENTED FOR REVIEW

The facts in this case were stipulated, (A. 18) and reveal that the Toltec Watershed Improvement District was created under the Wyoming Statutes. Such statutes provide for a referendum, Wyoming Statutes 1957, Section 354.8 and 354.9, in which only landowners may vote and for the District to be created a majority of the landowners must vote for its creation and those affirmative votes must represent a majority of the acreage contained in the proposed district. The Wyoming Supreme Court found such statutes to be constitutional. In light of the statuory procedures and the approval of the constitutionality of such statutes by the Wyoming Supreme Court, the following two questions are presented:

1) Whether or not the limiting of the voting franchise to property owners in the creation and maintenance of a watershed improvement district violates the Equal Protection Clause of the Fourteenth Amendment in

that an unreasonable, arbitrary and capricious voting classification is created; and

2) Whether or not the weighting of the votes in a watershed improvement district election by requiring a majority of the acreage is a debasement of the votes of smaller property owners and is violative of the one man-one vote doctrine of the Fourteenth Amendment.

STATEMENT OF THE CASE

The Appellee, Toltec Watershed Improvement District, hereinafter referred to as "Toltec", was organized under the provisions of Wyoming Statutes 1957, Sections 41-354.1 through 41-354.26. Pursuant to statutory provisions a referendum was held on May 12, 1969. At the election Associated Enterprises, Inc., a Wyoming corporation, was allowed to vote as it owned land within the proposed district.

Johnston Fuel Liners, a corporation, owns livestock and runs them on land owned by Associated Enterprises and leased by Johnston Fuel Liners, and which lands are within the Toltec District (A.19). Although given notice of the time and place of the referendum Johnston Fuel Liners had no statutory right to vote and did not vote.

On June 22, 1970 Toltec instituted this action in the District Court in and for Albany County, Wyoming suing Associated Enterprises, Inc. for a right of entry upon lands

owned by Associated and leased to Johnston Fuel Liners. Entry was sought for the purpose of carrying out studies to determine the feasibility of constructing a dam and reservoir to inundate a portion of Appellants' lands.

Johnston Fuel Liners intervened in the action. The facts were stipulated and the trial judge heard argument of counsel for the parties and entered an Order Judgment, (A.26-28) allowing intervention of the lessee Johnston Fuel Liners.

In the Answer of Associated Enterprises, Inc. (A.8-12) and the Motion to Intervene and Answer of Johnston Fuel Liners (A.14-16) Appellants contended that Toltec was organized under a statute of Wyoming which violated the Equal Protection Clause of the Wyoming and United States Constitutions.

On argument to the trial judge the constitutionality of the Wyoming Watershed Improvement Act was upheld, and on appeal to the Wyoming Supreme Court the constitutionality of the Act was again affirmed. Its opinion is officially reported at 490 P.2d 1029. The Court found the Equal Protection Clause of the Fourteenth Amendment inapplicable to proprietory function of legal subdivisions, held that in equal protection cases involving the elective franchise the burden of proving a statute unconstitutional falls upon the party asserting the unconstitutionality, and then found a "tendency for judges and courts to over-

react to decisions of the United States Supreme Court". In effect the Wyoming Supreme Court simply refused to extend the one man-one vote concept to a local unit of government.

SUMMARY OF ARGUMENT

1. The limiting of the voting franchise to property owners in the creation and maintenance of a watershed improvement district violates the "Equal Protection' clause of the Fourteenth Amendment in that an unreasonable, arbitrary and capricious voting classification is created.

The Toltec Watershed Improvement District was created as a result of a referendum held May 12, 1969. All requisite statutory procedures were followed. The requirements of the statute are that only the owners of land lying within the proposed district may vote and the proposal to form the district must carry by the affirmative vote of landowners owning more than a majority of the number of acres in the proposed district.

Under the Wyoming Statutes a watershed improvement district is a governmental entity and body politic possessing the power to levy and collect assessments, buy and sell real and personal property, exercise the power of eminent domain, borrow money and sell bonds.

Appellants contend the requirement that to vote one must own land is an unconstitutional voting classification. Reasonable classi-

fications of voters and voting restrictions have been recognized as constitutional but the burden of showing them to be constitutional falls upon the one justifying the classification and restriction, which burden was not carried by Appellee. No compelling state interest dictates the denial of the elective franchise to non-landowners in watershed improvement districts.

A classification of voters based upon being a parent or guardian has been held to be unreasonable. A classification based upon being a member of the armed forces, or owning real property has been held to be unconstitutional.

2. The weighting of the votes by a majority of the acreage is a debasement of the votes of the smaller property owners and is violative of the one man-one vote rule.

The United States Constitution guarantees to a voter a vote equal in value to all other votes. Debasement of an elector's vote by geographical units, by wealth through ownership of land, or the value of property owned as reflected by assessment rolls has been held unconstitutional. This concept has been extended wherever the right to vote is exercised in a governmental function without regard to whether the election is for a Congressman, State Legislator, School Board member, County Commissioner, or for issuance of bonds and creation of indebtedness or organization of a

governmental organization. It applies whether the governmental unit is a state, county, school district, or form of governmental unit and without regard to whether the functions are proprietory or governmental in character.

ARGUMENT

I.

I. The limiting of the voting franchise to property owners in the creation and maintenance of a watershed improvement district violates the "Equal Protection" clause of the Fourteenth Amendment in that an unreasonable, arbitrary and capricious voting classification is created.

In enacting the watershed improvement district statute the Wyoming Legislature created a voting classification and limited the voting franchise to only property owners. Wyoming Statutes 1957, Section 41-354.9 states in part:

> B. All owners of land lying within the boundaries of the proposed district, as determined by the board of supervisors, shall be eligible to vote in the referendum. Only such owners of land shall be eligible to vote.

The definition of a landowner is set out in Wyoming Statutes 1957, Section 41-354.1:

> C. "Landowner" means any person, firm or corporation holding title to, or occupying under a contract of purchase, any land

> lying within a watershed improvement district organized or proposed to be organized under the provisions of this act.

The Legislature has chosen to differentiate between two classes of people, landowners on the one hand as defined by the Statute, and non-landowners on the other hand. The issue thus presented for determination is whether or not such a voting classification is permitted under the Equal Protection Clause of the United States Constitution.

It is well settled that a state may classify persons and objects for the purpose of legislation and pass laws applicable only to persons or objects within a designated class. 16 Am Jur 2d, Section 494, page 860. The state has the right to make reasonable classifications and to make voting conditions upon which voting may be exercised. Lassiter vs. North Amington County Board of Elections, 360 U.S. 45, 79 S. Ct. 985, 3 L. Ed. 2d, 1072 (1959); Carrington vs. Rash 380 U.S. 89, 85 S. Ct. 775 (1965).

However, the states do not have a free hand in determining classifications. Each classification must be reasonable and based upon substantial distinctions. 16 Am Jur 2d Constitutional Law Section 498, pages 867-869 states:

> The mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause of the Fourteenth

> Amendment. One of the essential requirements as to classification, in order that it may not violate the constitutional guaranty as to equal protection of the laws, is that the classification must not be capricious or arbitrary, but must be reasonable and natural, and must have a rational basis.

It is further stated in 16 Am Jur 2d, Section 496, page 860:

> It is class legislation, discriminating against some and favoring others, that is prohibited by the equal protection guaranty.

In the case of Carrington v. Rash, 380 U. S. 89, 85 S. Ct. 775 (1965) the general legal principles concerning voting classifications and the Equal Protection Clause of the Fourteenth Amendment were emphasized by this Court. The case involved a Texas statute which excluded any soldier in uniform who moved to Texas from voting regardless of how long the soldier had been present within the state and his intention as to domicile. The Court said, 85 S. Ct. 777:

> Indeed, the States have long been held to have broad powers to determine the conditions under which the right of suffrage may be exercised. In other words, the privilege to vote in a state is within jurisdiction of the state itself, to be exercised as the state may direct, and upon such

> terms as to it may seem proper, provided, of course, no discrimination is made between individuals in violation of the Federal Constitution.

And at page 778:

> And mere classification, as this Court has often said, does not of itself deprive a group of equal protection.
>
> But the fact that a state is dealing with a distinct class and treats the members of that class equally does not end the judicial inquiry. The Courts must reach and determine whether the classifications drawn in a statute are reasonable in light of its purpose. . . .

The requirement of a reasonable classification has been recognized by the Wyoming Supreme Court. Bell vs. Gray 377 P.2d 924 (Wyo. 1963), was an action by an insurance company for judgment declaring W. S. 1957, Section 26-67.1 - 67.11 unconstitutional. The statute required that all insurance agents take written exams except those agents selling insurance for cars. The Court in holding such statute unconstitutional quoted from Miller vs. Board of County Commissioners of the County of Natrona, 337 P.2nd, 262, (Wyo. 19), and at page 269:

> There must be some difference which furnishes a reasonable basis for different legislation as to the different classes and not a purely arbitrary one, having no just relation to the subject of the legislation.

In Ludwig vs. Harston 197 P.2d 252, (Wyo. 1948) the Wyoming Supreme Court said at 257:

> The classification must be reasonable in view of the object sought to be accomplished. The discrimination must rest upon some reasonable ground of difference between the persons or things included and those excluded, having regard to the purpose of the legislation and within the sphere of its operation, the statute must affect all persons similarly situated.

The United States Supreme Court has scrutinized statutes which limit the voting franchise to certain people in two recent cases. The case of Kramer vs. Union Free School District, 395 U. S. 621, 89 S. Ct. 1886 decided on June 16, 1969 involved a class action for determination that a New York statute was unconstitutional. The statute limited the franchise in certain school districts to owners or lessees of taxable realty and parents or guardians of children in public schools. The Court held that such limitation of the voting franchise was in violation of the Equal Protection Clause of the Fourteenth Amendment. When the voting franchise is involved, the Courts usually will give the statutes an exacting examination. Justice Warren stated at 395 U.S. 626-627, 89 S. Ct. at 1889-1890:

> Since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political

rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized. (Citations omitted). This careful examination is necessary because statutes distributing the franchise constitute the foundation of our representative society. Any unjustified discrimination in determining who may participate in political affairs or in the selection of public officials undermines the legitimacy of representative government.

Thus, state apportionment statutes which may dilute the effectiveness of some citizens votes, receive close scrutiny from this Court (citations omitted). No less rigid an examination is aplicable to statutes denying the franchise to citizens who are otherwise qualified by residence and age. Statutes granting the franchise to residents on a selective basis always pose the danger of denying some citizens any effective voice in the governmental affairs which substantially affect their lives. Therefore, if a challenged state statute grants the right to vote to some bona fide residents of requisite age and citizenship and denies the franchise to others, the Court must determine whether the exclusions are necessary to promote a compelling state interest. (Citations omitted).

Since the voting franchise is the basis of all liberty, statutes limiting such do not carry

with them the ordinary presumption of constitutionality. This Court stated:

> Accordingly, when we are reviewing statutes which deny some residents the right to vote, the general presumption of constitutionality afforded state statutes and the traditional approval given state classifications if the Court can conceive of a "rational basis" for the distinctions made are not applicable. (Citations omitted).

The Court pointed out that the states do have latitude in choosing whether officials should be appointed or elected. However, once the election process has been chosen, the Fourteenth Amendment must be followed. As stated in the opinion at 395 U. S. 629, 89 S. Ct. 1889-1890:

> However, once the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment.

Furthermore, the subject matter of the election is not controlling as to the reasonableness of the classifications. At 395 U. S. 629, 89 S. Ct. 1891 it was stated:

> Our exacting examination is not necessitated by the subject of the election; rather, it is required because some resident citizens are permitted to participate and some are not.

The Court laid down a test to determine if a voting classification would be reasonable and in line with the Fourteenth Amendment. At 395 U. S. 633, 89 S. Ct. 1893, the Court stated:

> The issue is whether the Section 2012 requirements do in fact sufficiently further a compelling state interest to justify denying the franchise to appellant and members of his class.

The second case, decided on the same day as Kramer vs. Union Free School District, was that of Cipriano vs. City of Houma 395 U. S. 701, 89 S. Ct. 1897 (1969). The case was a class action brought by residents of the city to enjoin the city and others from issuing utility revenue bonds. The Louisiana statute which authorized the issuance of the bonds gave the right to vote only to property taxpayers. In declaring that such limitation of the franchise was unconstitutional, the Court in a per curiam opinion relied extensively on the language of the Kramer case and on the fact that both property owners and nonproperty owners would be substantially affected in like degree by the revenue bonds. It is interesting to note that the statute under consideraion was similar to the Wyoming statute in that in addition to limiting the right to vote to property owners, it also required that the bonds could be issued only if they were approved by a majority in number and amount of the property qualified to vote.

The Court reiterated the compelling state interest test of Kramer at 395 U. S. 704, 89 S. Ct. 1899:

> As we noted in Kramer, supra, if a challenged state statute grants the right to vote in a limited purpose election to some otherwise qualified voters and denies it to others, the Court must determine whether the exclusions are necessary to promote a compelling state interest.

The Court proceeded to set out a further requirement in a classification of the voting franchise. At 395 U. S. 704, 89 S. Ct. 1900 it was stated:

> . . . whether the statute allegedly so limiting the franchise denies equal protection of the laws to those otherwise qualified voters who are excluded depends on whether all those excluded are in fact substantially less interested or affected than those the statute includes. (Citations omitted).

The Supreme Court in Turner V. Fouche, 90 S. Ct. 532 decided on January 19, 1970, had before it an action by negro school children and their fathers against the members of the County Board of Education seeking an injunction prohibiting enforcement of the Georgia constitutional and statutory provisions which first resulted in discrimination on membership of a grand jury and second required that members of the Board of Education be freeholders.

In regard to the freeholder requirement, the Appellants urged that the Kramer and Cipriano cases require that the state show a compelling state interest. The Appellees on the other hand contended that the Kramer and Cipriano cases were not applicable because they involved exclusions from voting, not from office holding. The court in holding that the freeholder requirement was unconstitutional based its decision on the traditional test for the denial of equal protection; that is, whether the challenged classification rests on ground wholly irrelevant to the achievement of a valid state objective. The court stated at p. 542:

> It cannot be seriously urged that a citizen in all other respects qualified to sit on a school board must also own real property if he is to participate responsibly in educational decisions, without regard to whether he is a parent with children in the local schools, a lessee who effectively pays the property taxes of his lessor as part of his rent. . . .
>
> Nor does the lack of ownership of realty establish a lack of attachment to the community and its educational values. However reasonable the assumption that those who own realty do possess such an attachment, Georgia may not rationally presume that the quality is necessarily wanting in all citizens of the county whose estates are less than freehold. . .

> Without excluding the possibility that other circumstances might present themselves in which a property qualification for office-holding could survive constitutional scrutiny, we cannot say, on the record before us, that the present freeholder requirement for membership on the county board of education amounts to anything more than invidious discrimination.

Evans v. Cornman, 90 S. Ct. 1752 decided on June 15, 1970, was an action by individuals living on ground of a federal enclave in Maryland against members of the County Board of Registry to enjoin as unconstitutional the application of the Maryland Voter Residency Law so as to deny them the right to vote. The state argued in the case that the residents were substantially less interested in Maryland's affairs than other residents of the state because the constitution vests exclusive legislation in all cases over the federal enclave in the Congress. The court in citing both Kramer and Cipriano plus other recent cases held that the state did not show a compelling state interest of sufficient magnitude to justify exclusion of people living on tax-exempt property from the voting rolls.

The case of the City of Phoenix Arizona v. Kolodziejski, 90 S. Ct. 1990 decided on June 23, 1970 is especially pertinent in that therein the Court held that an election to approve issuance of a general obligation bond came within the purview of the Kramer and Cipriano

cases. The case was instituted by a resident who was otherwise qualified to vote in an election except for the ownership of real property requirement. The City of Phoenix had held an election to authorize the issuance of eight general obligation bonds and two revenue bonds. Under the Arizona law, property taxes were to be levied to service this indebtedness, although the City was legally privileged to use other revenues for this purpose. Pursuant to Arizona constitutional provisions, only real property owners could vote in the election. In the lower court, the City argued that the Kramer and Cipriano cases were not applicable since here involved were general obligation bonds whereas the Cipriano case involved revenue bonds which were to be retired by the profits from the improvements themselves. According to the state, the state was justified in recognizing the unique interest of real property owners in the case of general obligation bonds since their property would be directly assessed for payment of the bonds and the assessment could become a lien upon the property. Non-property owners on the other hand, the state argued, were under no obligation to pay for the bonds. The Supreme Court in affirming the three judge District Court decision said at 90 S. Ct. 1994:

> The differences between the interests of property owners and the interests of non-property owners are not sufficiently sub-

> stantial to justify exclusion of the latter from the franchise . . .
>
> Property taxes may be paid initially by property owners, but a significant part of the ultimate burden of each year's tax on rental property will very likely be borne by the tenant rather than the landlord since, . . . the landlord will treat the property tax as a business expense and normally will be able to pass all or a large part of this cost on to the tenants in the form of higher rent.

The court then concluded by saying at 1995:

> We thus conclude that, although owners of real property have interests somewhat different than interests of non-property owners in the issuance of general obligation bonds, there is no basis for concluding that non property owners are substantially less interested in the issuance of these securities than are property owners.

The above Supreme Court decisions are now being implemented by the lower Federal Courts, and some of their rulings are relevant to this action.

In the case of Stewart v. Parish School Board of Parish of St. Charles, 310 F. Supp., 1172 (La. Feb. 25, 1970), the court followed the decisions of the Kramer and Cipriano cases in holding that exclusion of non-property owners from school bond elections violated the equal

protection clause of the Constitution. The school board had conducted a special election to decide the issuance of bonds for the capital acquisition and improvement of the public schools. Non-property owners were excluded from the election pursuant to the Louisiana Statute which as in the Cipriano case limited the voting franchise to property owners and further required that the bonds be approved by a "majority in number and amount of the property" of taxpayers' voting. The court in finding no furtherance of a compelling state interest in excluding property owners said at 1177-1178:

> The State's compelling interest in fixing the qualifications of voters in school bond elections is to delegate to the voters in each school district the authority to improve public education in their district. The objective is certainly not promoted by excluding parents and guardians of school children and others who cannot be characterized as having a substantially less interest in public education than property taxpayers.

The court then held that the "majority in number and the amount of property" requirement violated the one-man one-vote. At 1179 it is stated:

> The requirement that the bond issue be approved by a majority of the taxpayers voting representing a "majority of the assessed property owned by those taxpayers

> who are actually voting" apparently rests on the assumption, first, that property owners have a special pecuniary interest; second, that the larger the assessment the greater the need to protect large property owners from irresponsible owners having no property. Kramer and Cipriano cut through the basic assumption. It is not enough to show that included groups have an interest. It must be shown that the exclusions are necessary to promote a compelling state interest. In terms of voting responsibility, there is no necessary correlation between the amount of an assessment and the degree of interest a taxpayer may have in a particular bond issue. A ten thousand dollar house to one person may mean more to that person than a hundred thousand dollar house to another.
>
> The actual effect of gearing assessments to the vote is simply to dilute the participation of small landowners and to exaggerate the participation of large landowners in violation of the one man, one vote canon.

The court continued at 1180 to say:

> It is conceivable that in a small rural school district a handful of taxpayers would have the veto power over public school improvements. In any voting district, the small homeowner would have his vote diluted.

The case of Stapleton v. Clerk for the City of Inkster, 311 F. Supp. 1187, decided April 29, 1970, was an action by a potential candidate for city office for a Writ of Mandamus to direct that his name be put on the ballot. The Plaintiff seeking the office of Councilman was excluded from candidacy due to a requirement in the City Charter that no person should hold any elected office unless he was a resident and a property owner within the city for at least two years. The court held that the statutory requirement was unconstitutional both in light of the traditional standard and also the compelling state interest. The court specifically held at 1190 that:

> It appears to this court that the reasons given for requiring the compelling interest standard in voting cases are equally applicable to cases challenging qualifications for public office; in both situations the challenge is directed to the assumption that the institutions of state government are structured so as to fairly represent all the people. Thus, the City must demonstrate a compelling interest to justify the ownership of real property in the City as a qualification to hold office and the City does not have the advantage of the usual presumption that the Charter is constitutional.
>
> It also appears to the court that the "compelling interest" standard must be applied, since this requirement also burdens

> the voter plaintiffs' right to vote. It is unquestioned that a voter has a constitutionally protected right to vote for the candidate of his choice and to have his votes counted. Reynolds v. Sims, 377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964). It is also established, as pointed out previously, that a person has a constitutionally protected right to be considered for public office without the burden of invidiously discriminatory disqualificatons. Turner v. Fouche, 396 U.S. 346, 362, 90 S.Ct. 532, 24 L.Ed.2d 567 (1970). It seems clear to this court that a restriction upon who may be a candidate necessarily affects the efficacy of a person's vote. The effectiveness of the franchise can just as certainly be curtailed by restricting the group from whom candidates may be drawn as by restricting those entitled to cast a vote or by malapportioning a legislative body.

The court further said at 1192:

> The claim that councilmen must be restricted to owners of real property seems to this court merely another way of saying that non-landowners would not act frugally or responsibly.

With the foregoing legal principles established by the United States courts, the question arises as to whether the voting classification created by the statute in Wyoming is necessary to further a compelling state inter-

est, and secondly to see if those excluded from voting are, in fact, substantially less interested and affected than those the statute includes.

Existence of a compelling state interest in enacting the "Watershed Improvement District statute" can best be determined by looking to the purposes of the act. Section 41-354.2 provides:

> **Purposes of Act**—The purposes of this act are to provide for the prevention and control of erosion, floodwater and sediment damages, and the storage, conservation development, utilization and disposal of water, and thereby to preserve and protect land and water resources, and to protect and promote the health, safety and general welfare of the people of this state.

Non-property owners are as much interested in their environment as are property owners and the preservation of the land by prevention and control of erosion, floodwater and sediment damages is a matter of general public interest. Protection and preservation of land and water resources promotes and leads to improved fishing and recreational facilities, which are items of interest and benefit to all people and not just landowners. Nonlandowners are also interested in the "health, safety and general welfare" of all the people of this state. By recitation of the purposes of the Act it is made clear that the subject mat-

ter of the legislation is of interest to all voters. No compelling state interest is demonstrated by the statute to justify the denial of the voting franchise to non-landowners.

In regard to the second requirement of the Kramer and Cipriano cases, non-property owners are not in fact substantially less interested or affected than property owners. The statute under consideration herein involves the creation of Watershed Improvement Districts. Lands within a district are affected in the same way whether they are being utilized directly by a landowner or leased to a non-landowner. Lessees do not fall within the scope of a landowner, see Wyoming Statutes 1957, Sec. 41-351.1. However, a lessee, just like a landowner, benefits from the use of the water to the same degree as a property owner. As the landowners and non-landowners used the utilities and paid the rates in the Cipriano case, landowners and non-landowners in the water improvement district will both use the water and pay the rates to the same degree. Although the benefits of the water improvement district will be directly assessed against the landowners, the lessees in reality will pay for such in the form of increased rental payments. Indeed, the benefits and burdens of the water improvement district will fall indiscriminately on landowner and non-landowner alike.

It is possible that a person living without the district in a distant state or country could

have inherited lands within the district. Nevertheless, this individual qualifies as a landowner under the Watershed Improvement Dstrict and has the right to petition for the establishment and vote in the election for the creation of a Watershed Improvement District. However, a lessee who is residing on the land within the district, who depends upon the land for his very livelihood and who is vitally concerned with anything which affects his land is excluded from determining the future of the land. The statute has no reasonable basis for classifying people by landowners or non-landowners, just as there was no such basis in the Cipriano case.

In addition to limiting the voting franchise by an arbitrary classification, the Water Improvement District makes further unreasonable and unconstitutional classification in the rights for petitioning for the establishment of a district, qualifications of the Board of Directors and the right to nominate candidates for directors.

> Section 41-354.5. When a majority of the landowners in the proposed district, desire to form a watershed improvement district, they shall file a petition with the board of supervisors of the soil and water conservation district . . .
>
> Section 41-354.12. C. Nominating petitions may be filed with the board of super-

> visors to nominate candidates for directors of the watershed improvement district. No such nominating petition shall be accepted by the board of supervisors unless it shall be signed by ten (10) or more owners of land. . . No person shall be eligible to be a director of a watershed improvement district who is not an owner of the land within the watershed improvement district in which he seeks election.

Here again a lessee is capriciously excluded from participating in the creation and operation of a water improvement district. The lessee is equally interested in and affected by a petition for the establishment of the Water Improvement District as is the landowner. He is as equally interested and affected by the actions of the Board of Directors as is a landowner. His status as a lessee precludes him from choosing members of the Board, and also precludes him from serving as a member of the Board of Directo[illegible].

The statute as enacted will permit a landowner who resides without the district to be a board member to vote for the Board, to govern the operation by serving as a board member, but it excludes a lessee who resides therein laboriously and conscientiously working the land from qualifying. Thus both landowners and non-landowners are in fact equally inter-

ested and affected by the creation and operation of the Water Improvement District in the same degree, and the distinction between them as created by the statute is unconstitutional.

II.

II. The weighting of the votes by a majority of the acreage is a debasement of the votes of the smaller property owners and is violative of the one man-one vote rule.

Since its inception in 1963 the one-man one-vote principle has progressively and consistently been broadened to envelop both national, state and local popular elections.

The one-man one-vote concept sprang from the case of Gray vs. Sanders, 372 U. S. 368, 83 S. Ct. 801, 9 L. Ed. 2d 821 (1963). That case was a suit by qualified voters to restrain the defendants from using the unit system as a basis for counting votes in a primary election for statewide offices. The Supreme Court, Justice Douglas speaking, held that the Federal District Court properly enjoined the conduct of statewide primary election under counting units system which gave every qualified voter one vote, but which in counting the vote employed a system which in end result weighted rural votes more heavily than urban votes and weighted some small rural counties heavier than other larger counties. The Court

in its opinion used the following pertinent language, 83 S. Ct. 808, 809:

> Once the geographical unit for which a representative is to be chosen is designated, all who participate in the election are to have an equal vote—whatever their race, whatever their sex, whatever their occupation, whatever their income, and wherever their home may be in that geographical unit. This is required by the Equal Protection Clause of the Fourteenth Amendment. The concept of 'we the people' under the Constitution visualizes no preferred class of votes but equality among those who meet the basic qualifications.
>
> But once the class of voters is chosen and their qualifications specified, we see no constitutional way by which equality of voting power may be evaded.
>
> The conception of political equality from the Declaration of Independence, to Lincoln's Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can mean only one thing—one person one vote.

One-man one-vote was extended in 1964 to congressional district plans enacted by state legislatures that embodied discrimination in the exercise of the voting franchise. The case of Wesberry vs. Sanders, 376 U. S. 1, 84 S. Ct. 526, 11 L. Ed. 2d 481 (1964) was an action by

qualified voters to strike down Georgia's statute prescribing congressional districts. The Supreme Court reversed a three judge district court and held that apportionment of congressional districts so that a single Congressman represented from two to three times as many fifth district voters as were represented by each of the congressmen from other Georgian districts, grossly discriminated against voters in the fifth district in violation of the constitutional requirements that representatives be chosen by people of the several states. Justice Black in his opinion made the following statements, 376 U. S. 7, 8, 9:

> The apportionment statute thus contracts the value of some votes and expands that of others.
>
> We hold that construed in its historical contents the command of Article I Section 2 that representatives be chosen by people of the several states means that as nearly as is practical one-man vote in a congressional election is to be worth as much as another.
>
> No right is more precious in a free country than that of having a voice in the election of those who make the laws under which as good citizens we must live. Other rights, even the most basic are illusionary if the right to vote is undermined. Our Constitution leaves no room for classification of people in a way that unnecessarily abridges this right.

The next forward step which entrenched the one-man one-vote principle as a viable constitutional doctrine was in Reynolds vs. Sims et al, 377 U. S. 533, 84 S. Ct. 1362, 12 L. Ed. 2d 506, (1964) and its companion cases. The Reynolds cases involved the Alabama legislature reapportionment. The Supreme Court held that the one-man one-vote principal was applicable to both state legislative houses and that both houses must be apportioned on a population basis. The Court found that the federal analogy to the senate was inapposite. The following language was used in the opinion:

> To the extent that a citizen's right to vote is debased, he is that much less a citizen. 377 U.S. at 567, 84 S. Ct. at 1384.
>
> Citizens, not history or economic interests, cast votes. Considerations of area alone provide insufficient justification for deviations from the equal-population principle. Again, people, not land or trees or pastures vote. 377 U.S. 580, 84 S. Ct. at 1391.

The Reynolds case has been followed in Schaffer vs. Thompson, 240 F. Supp. 247 (Wyo. 1964) wherein the Wyoming state legislature apportionment was held invidious discrimination and violative of the equal protection laws of the Fourteenth Amendment.

In 1967, the Supreme Court declined to extend the one-man one-vote rule in the case of

Sailors vs. Board of Education, 387 U. S. 105, 87 S.Ct. 1549 (1967). The case involved a Michigan school board whereby the county boards were chosen by delegates who were selected by a local board. The Court refused to apply the one-man one-vote principle on the grounds that the Board of Education performed merely administrative functions rather than legislative ones, and that the positions were basically appointed rather than elective. The application of the Sailors case has been restricted by subsequent Supreme Court decisions and has validity only in situations directly in point, that is, where the officials perform merely administrative functions and in addition are appointed rather than being elected.

The next big expansion of the one-man one-vote principle occurred in the case of Avery vs. Midland County, Texas, 390 U.S. 474, 88 S. Ct. 1114 (1968). Midland County, Texas had five county commissioners. One of these, the judge, was elected by popular vote from the entire populace. The remaining four were elected from districts. One commissioner was elected from a district encompassing the City of Midland which had a population of 67,-906, while the remaining three were elected from districts, each of which had less than 1,-000 pople. The Supreme Court held that the election of county commissioners, even though such was a local election, was within the blanket of the Fourteenth Amendment, since the commissioners exercised general govern-

ment functions. The Court made the following statements:

> The Equal Protection Clause reaches the exercise of state power however manifested, whether exercised directly or through subdivisions of the State. U.S. at 479, 88 S. Ct. at 1117-1118.
>
> A city, town or county may no more deny the equal protection of the laws than it may abridge freedom of speech, establish an official religion, arrest without probable cause, or deny due process of law. 390 U.S. at 480, 88 S. Ct. at 1118.
>
> Our decision today is only that the Constitution imposes one ground rule for the development of arrangements of local government: a requirement that units with gen ral governmental powers over an entire geographical area not be apportioned among single-member districts of substantially unequal population. 390 U. S. at 485-486, 88 S. Ct. at 1121.
>
> We hold today that the Constitution permits no substantial variation from equal population in drawing districts for units of local government having general goverental powers over the entire geographic area served by the body. 390 U.S. at 484-485, 88 S. Ct. at 1120.

Out of the Avery case came the test that if the officials to be elected possessed general governmental powers, the election came within the purview of one-man one-vote and must be based on population.

The final step in the expansion of the one-man one-vote principle came with the decision in the Hadley vs. Junior College District of Metropolitan Kansas City, U.S. 90 S. Ct. 790, 25 L. Ed. 2d 45 (1970). The case was an appeal from the Missouri Supreme Court, which, relying upon the Avery decision, had held that the statute for the election of the trustees of a college district was constitutional since the one-man one-vote rule was inapplicable due to the fact that the trustee did not have general governmental powers over the entire district. Pursuant to the statute, fifty percent of the trustees of the college district were elected from a subdistrict having sixty percent of the school age children. Residents of the subdistrict had sued on the theory that their vote was diluted. The Supreme Court reversed the Missouri Court and held the statute unconstitutional. The Court at 90 S. Ct. 794 stated:

> We have applied this principle in congressional elections, state legislative elections, and local elections. The consistent theme of those decisions is that the right to vote in an election is protected by the United States Constition against dilution or debasement.

The Court repudiated the general governmental powers test of the Avery decision and dispelled the theory that the applicability of the Fourteenth Amendment would be determined by the purpose of the election. The Court said at 90 S. Ct. 794:

> . . . there is no discernible, valid reason why constitutional distinctions should be drawn on the basis of the purpose of the election. If one person's vote is given less weight through unequal apportionment, his right to equal voting participation is impaired just as much when he votes for a school board member as when he votes for a state legislator. While there are differences in the powers of different officials, the crucial consideration is the right of each qualified voter to participate on an equal footing in the election process.

The Court continued by expressly overruling the legislative vs. administrative function test. At 90 S. Ct. 795, the Court stated:

> It has also been urged that we distinguish for apportionment purposes between elections for "legislative" officials and those for "administrative" officers. Such a suggestion would leave courts with an equally unmanageable principle since governmental activities "cannot easily be classified in the neat categories favored by civics texts", (Citation omitted), and it must also be rejected.

The Court then laid down the rule of the case at 90 S. Ct. 795:

> We therefore hold today that as a general rule, whenever a state or local government decides to select persons by popular election to perform governmental functions, the Equal Protection Clause of the Fourteenth Amendment requires that each qualified voter must be given an equal opportunity to participate in that election. . .

The impact and breadth of the Hadley decision was especially brought forth in Mr. Justice Harlan's dissenting opinion. The Justice stated at 90 S. Ct. 797:

> And today, the Court holds the "one man one vote" rule applicable to the various boards of trustees of Missouri's junior college system, and the case forbodes, if indeed it does not decide, that the rule is to be applied to every elective public body, no matter what its nature.

Justice Harlan took particular issue with the abolition of the general powers rule of the Avery decision at 90 S. Ct. 797, where he stated:

> The Midland County Commissioners Court, the body whose composition was challenged in Avery, was found to possess a broad range of powers that made it "representative of most of the general govern-

> ing bodies of American cities, counties, towns and villages" and the Court was at pains to limit its holding to such general bodies. 390 U. S. at 482-485, 20 L. Ed. 2d at 52-54. Today the Court discards the limitation, stating that "there is no discernible, valid reason why constitutional distinctions should be drawn on the basis of the purpose of the election".

Justice Harlan then continued to state:

> From irrigation districts to air pollution control agencies to school districts, such units vary in the magnitude of their impact upon various constituencies and in the manner in which the benefits and burdens of their operations interact with other elements of the local political and economic picture. Today's ruling will forbid these agencies from adopting electoral mechanisms and take these variations into account.

The Wyoming Watershed Improvement District statute definitely and unequivocally meets the two criteria of the Hadley case for application of the one-man one-vote principle.

First, the state has elected to choose the popular election process in the creation of the watershed improvement district. Section 41-354.8 of the Statutes provides that a referendum shall be a prerequisite to the establish-

ment of the district. Section 41-354.10 provides in part:

> . . . provided, however, that the board of supervisors shall not have authority to determine that the operation of watershed improvement district is administratively practicable and feasible unless at least a majority of the votes cast in the referendum which affirmative votes represent (a) majority of the acreage contained in the proposed watershed improvement district, favored creation of the watershed improvement district.

Thus, even though the board of supervisors make the formal declaration of the creation of the watershed improvement district, their decision is controlled by and made contingent upon the vote of the qualified voters.

In addition to the creation of the watershed improvement district, the state has also decided to use the popular election process to determine the issuance of bonds. Section 41-354.14 states in part:

> A. Bonds authorized by Section 13 shall not be issued until proposed by order or resolution of the board of directors. . .
>
> B. The board of directors shall conduct a hearing on such a proposal after due notice of such hearing has been given. If it appears that the proposal was within the scope and purpose of this act and meets all the other requirements of the

> law, the proposal shall be submitted to the land owners of the watershed improvement district by a referendum held under the supervision of the board of supervisors.

The election process used in the creation of a watershed improvement district and in the determination of the issuance of the bonds taken individually or collectively fulfill the popular election requirement of the Hadley decision.

Looking now at the governmental function requirement of the Hadley decision, the watershed improvement district certainly comes within the scope of such requirement. Section 41-354.10 provides in part:

> . . . such watershed improvement district shall thereupon constitute a governmental subdivision of this state and a public body corporate and politic.

Besides being a governmental subdivision, the watershed improvement districts vest in the board of directors powers which are very clearly governmental functions. Section 41-354.13 provides:

> Under the supervision of the board of supervisors, the board of directors of a watershed improvement district shall have the power to:
>
> A. Levy and collect assessments for special benefits accruing to land, as hereinafter provided.

B. Acquire by purchase, exchange, lease, gift, grant, bequest, devise, or otherwise, any property, real or personal, or rights or interests therein; maintain, administer, and improve any such property; and sell, lease or otherwise dispose of any such property in furtherance of the purposes and provisions of this act (Sections 41-354.1 to 41-354.26.)

C. Exercise the power of eminent domain and in the manner provided by law for the condemnation of private property for public use.

D. Construct, improve, operate and maintain such structures as may be necessary for the performance of any authorized function of the watershed improvement district.

E. Borrow such money as is necessary to carry out any of the purposes and provisions of this act and issue, negotiate, sell its bonds or other evidence of indebtedness, as provided in Section 14 (Section 41-354.1).

F. Cooperate with, and receive from or grant assistance to, towns, cities, counties and state and federal agencies in carrying out the purposes and provisions of this act.

It is beyond argument that these powers are governmental functions, and in fact constitute legislative functions rather than administra-

tive functions. For example, the power of eminent domain is inherently governmental. See 26 Am Jur 2d Eminent Domain, Section 2, Page 64. Taxation in the form of assessments is a governmental function, and the issuance of bonds for public improvements is a governmental function, 51 Am Jur 2d Taxation Sec. 2.

Since the watershed improvement district statute meets the requirements of the Hadley decision and hence falls within the purview of the one-man one-vote principle, it must now be decided whether or not the one-man one-vote principle has been followed therein. It definitely has not.

The statute sets up a voting procedure which results in the weighting of certain votes and the dilution of others. Section 41-354.10 provides in part:

> . . . the board of supervisors shall not have authority to determine that the operation of the watershed improvement district is administratively practicable and feasible unless at least a majority of the votes cast in the referendum which affirmative votes represent (a) majority of the acreage contained in the proposed watershed improvement district, favor creation of the watershed improvement district.

Thus in addition to having a majority of votes of all the qualified votes there must also be a majority of the acreage. This results in a large landowner's vote carrying greater weight than

the smaller landowner's vote. It is theoretically possible that ninety-nine percent of the qualified voters could vote in the affirmative, but if one percent of the people held fifty-one percent of the land and voted negatively the water improvement district could not be approved and created. This is a circumstance where land, and not people, is voting. It is well to again note the language of Justice Warren.

> Again, people, not land or trees or pastures, vote. Reynolds v. Sims et al, 377 U. S. 533, 580, 84 S. Ct. 1362, 1391.

It may be argued that the larger acreage owners have a special pecuniary interest in the election because of their assessments being larger than the smaller land owners. However, the special pecuniary interest idea has been rejected by the Supreme Court in Cipriano vs. City of Yuma, supra. Obviously, the voting setup here contracts the value of some votes and expands that of others.

In the recent case of Stewart vs. Parish School Board of Parish of St. Charles, 310 F. Supp. 1172, affirmed by the United States Supreme Court 136 a three judge District Court held a restriction that only property owners could vote in bond elections for a school district unconstitutional as a restriction, weighting the value of an elector's vote to the amount of his assessed valuation was unconstitutional. Gearing the weight of an elector's vote in a road bond election to the voter's assessed val-

uation was also stricken down in Louisiana by the United States Supreme Court in Police Jury of Parish of Vermilion vs. Hebert, 92 S. Ct. 52 (1971). In the instant case the restriction is based upon acres owned, a distraction without a difference from what has been held to be unconstitutional.

In addition to the creation of the watershed improvement district, the Wyoming statutes also provide for the weighting of any larger landowner's votes in the issuance of the bonds. Section 41-354.14 provides in part:

> D. If two thirds of the votes cast, which votes represent a majority of the acreage contained in the watershed district, are in favor of the proposed bond issue, such bonds shall be authoried and may be issued.

Here again there is a clear debasement of a man's vote. Here again economic interest and not citizens are allowed to cast their votes. Such voting arrangements are clearly unconstitutional and should be struck down by this court.

While some of the older cases, such as Mound vs. Miller, 70 S. W. 721 (Mo. 1902) have constitutionally permitted the weighting of votes by acreage in drainage districts, it must be noted that these older cases have been largely eroded by time and by recent Supreme Court decisions.

In its decision the Wyoming Supreme Court stated at 490 P. 2d 1070:

> Without reviewing the watershed improve district laws section by section, we can state categorically that the functions of such districts are proprietory and in the nature of special or private corporation purposes. The districts do not exercise delegated sovereign powers for the benefit of people generally. We need to make it clear that we are not saying a watershed improvement district is not a governmental entity. We merely say the functions are primarily proprietory and not governmental.

Such test was expressly revoked in the Hadley case, and the Wyoming Court felt required to recognize the holding of Hadley with the following observation at 490 P.2d 1072:

> The writer of this opinion believes there is sometimes a tendency for judges and courts to overreact to decisions of the United States Supreme Court.

The Wyoming Court then concluded, 490 P.2d 1072:

> It is apparent then, from the majority opinion and from the dissents in the Hadley decision, that the one man, one vote rule has not been extended to a local, specialized unit of government such as a watershed improvement district. We reject the idea that we should so extend the rule.

The Wyoming Supreme Court found comfort in the law relating to private corporations and the right of shareholders to vote not by one man, one vote, but the number of shares owned.

The grounds for upholding the constitutionality of the Wyoming Watershed Improvement District amount to nothing more than a naked refusal to follow the law as enunciated by this Court.

CONCLUSION

By way of summation, Appellants contend the statute under which Toltec was organized and created is unconstitutional.

The United States Courts have held a classification of voters who are to exercise the voting franchise is not presumed to be constitutional but must be proven to be constitutional. Such Courts have also recognized that states may classify voters eligible to vote, but hold the classification must be reasonable and based upon substantial distinctions.

Under the statute providing for the organization and operation of the Toltec Watershed Improvement District, the statutory purposes are stated to be for the benefit of all the people of the state. But only landowners are allowed to vote, not all the people who will be benefited by the statute. Only landowners may serve on the Board of Directors of the

District. The value of the votes cast is weighted so that large landowners carry greater weight than lessees and small landowners. Bonds may be issued only by the same election processes designed to enfranchise landowners and disenfranchise non-landowners and weight the larger landowners' votes.

Appellants contend such statute diluted the vote of Associated Enterprises and disenfranchised Johnston Fuel Liners and also completely disenfranchised the people living on the ranches but not owners of the land in the District. No compelling state interest is demonstrated by the statute or by Appellee to justify such a result. Under Kramer and Cipriano, Appellee has the burden of showing the constitutionality.

The concept of one man-one vote has steadily been extended and no classification of compelling state interest which erodes the one man-one vote concept seems constitutional.

The concept has been extended to congressional elections, state legislative elections and local elections involving the selection of school boards, county commissioners, bond elections and, according to Justice Harlan, was extended to irrigation districts. But the Wyoming Supreme Court simply refuses to recognize the law as enunciated by the Supreme Court of the United States.

It is submitted the decisions of the Albany County District Court of Wyoming and the Wyoming Supreme Court should be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, HENRY A. BURGESS, Attorney for Appellants in the above entitled and numbered cause, hereby certify that on the_____day of July, 1972 I served true and correct copies of Brief of Appellants by placing the same in the United States mail, postage prepaid at Sheridan, Wyoming, correctly addressed to:

Mr. Fred Phifer
Attorney at Law
Wheatland, Wyoming 82201

HENRY A. BURGESS

APPENDIX A

CHAPTER 6.1.

Watershed Improvement Districts.

Sec.

41-354.1. Definitions.

41-354.2. Purposes of act.

41-354.3. Formation.

41-354.4. Area.

41-354.5. Petition for establishment—Filing generally, contents; copy to be furnished soil and water conservation committee.

41-354.6. Same — Establishment in more than one soil and water conservation district.

41-354.7. Same—Hearing; notice.

41-354.8. Referendum prerequisite to establishment—Generally.

41-354.9. Same—Voting ballots; right of landowner to vote; proxies.

41-354.10. Same — Counting and recording votes; action upon results; certification of fact when created.

41-354.11. Inclusion of additional land; detaching land; change of boundaries; change of name.

41-354.12. Board of directors — Eligibility; nominating petition; election; terms; officers.

41-354.13. Same—Powers generally.
41-354.14. Same—Issuance of bonds.
41-354.15. Same—Per diem and mileage.
41-354.16. Hearing on proposed projects.
41-354.17. Appointment of appraisers and appraisal of benefited property.
41-354.18. Hearing on report of appraisers.
41-354.19. Appeal from approval of project or determination of benefits or assessments.
41-354.20. Assessment of benefits against land of state and its subdivisions.
41-354.21. Assessments generally.
41-354.22. Levy, collection and disposition of taxes and special assessments; expenditure of funds.
41-354.23. Lien of assessment; collection of delinquent assessments.
41-354.24. Discontinuance of districts.
41-354.25. Supervision by state soil and water conservation committee upon discontinuance.
41-254.26. Existing water rights preserved.

§ 41-354.1. Definitions.—A "Director" means a director of a watershed improvement district and "board of directors" means the governing body of a watershed improvement district.

B. "Supervisor" means a supervisor of the soil and water conservation district in which a watershed improvement district is situated; and "board of supervisors" means the governing body of the soil and water conservation district in which a watershed improvement district is situated.

C. "Landowner" means any person, firm or corporation holding title to, or occupying under contract of purchase, any land lying within a watershed improvement district organized under the provisions of this act. [§§ 41-354.1 to 41-354.26].

D. "Due notice" means notice published at least twice, with an interval of at least six (6) days between the two publication dates, in a newspaper of general circulation within the boundaries of the proposed or organized district, and by posting at five (5) conspicuous places within the organized or proposed district, such posting to include, where possible, posting at public places where it may be customary to post notices concerning county or municipal affairs generally. The notice of any hearing, election or referendum required to be held under this act shall fix the time, place and purpose thereof, which time shall be not less than ten (10) or more than fifteen (15) days after the first publication or first posting of such notice. At any hearing held pursuant to such notice, at the time and place designated in such notice, adjournment may be made from time to time without the neces-

sity of renewing such notice for such adjourned dates. (Laws 1961, ch. 215, § 1.)

§ 41-354.2. Purposes of act. — The purposes of this act [§§ 41-354.1 to 41-354.26] are to provide for the prevention and control of erosion, floodwater and sediment damages, and the storage, conservation development, utilization, and disposal of water, and thereby to preserve and protect land and water resources, and protect and promote the health, safety, and general welfare of the people of this state. (Laws 1961, ch. 215, § 2.)

§ 41-354.3. Formation.—Watershed improvement districts may be formed as subdistricts of soil and water conservation districts as herein provided for the development and execution of plans and projects relating to any of the purposes set forth in section 2 [§ 41-354.2]. (Laws 1961, ch. 215, § 3.)

§41-354.4. Area. — The land area embraced in a watershed improvement district must lie within the same or adjoining watershed or subwatershed areas. A watershed improvement district may embrace land lying in one or more soil and water conservation districts. Land lying within the boundaries of one watershed improvement district shall not be included in another watershed improvement district. (Laws 1961, ch. 215, § 4.)

§ 41-354.5. Petition for establishment — Filing generally; contents; copy to be furnished soil and water conservation committee. —

When a majority of the landowners in the proposed district, desire to form a watershed improvement district, they shall file a petition with the board of supervisors of the soil and water conservation district in which the proposed watershed improvement district is situated asking that a watershed improvement district be organized to function in the area described in the petition. Such petition shall set forth the boundaries of the proposed district, the number of acres of land involved, the reasons for requesting creation of such district, and the proposed name of such watershed improvement district. A copy of such petition shall be furnished to the state soil and water conservation committee. (Laws 961, ch. 215, § 5.)

§ 41-354.6. Same—Establishment in more than one soil and water conservation district. —If a proposed watershed improvement district is situated in more than one soil and water conservation district, copies of such petition shall be presented to the board of supervisors of all the soil and water conservation districts in which any part of the proposed watershed improvement district is situated, and the supervisors of all such soil and water conservation districts shall act jointly as a board of supervisors with respect to all matters concerning such watershed improvement district, including its organization. Such watershed improvement district shall be organized in like manner and shall have the same powers and

duties as a watershed improvement district situated entirely in one soil and water conservation district. (Laws 1961, ch. 215, § 6.)

§ 41-354.7. Same — Hearing; notice. — A. Within thirty days after such petition has been filed with or presented to the board of supervisors, it shall cause due notice to be given of a public hearing upon the practicability and feasibility of creating the proposed watershed improvement district. All owners of land within the proposed watershed improvement district and all other interested parties shall have the right to attend such hearing and to be heard. The state soil and water conservation committee may furnish advice and assistance to the board of supervisors in connection with such hearing. If it apears upon the hearing that any land included in the petition will not be benefited by its inclusion within the proposed watershed improvement district, the board of supervisors shall exclude such land from the proposed watershed improvement district.

B. If it appears upon the hearing that it may be desirable to include within the proposed watershed improvement district territory outside of the area described in such petition, the hearing shall be adjourned and due notice of a further hearing shall be given throughout the entire area considered for inclusion in such district, and a further hearing shall be held. After final hearing, if the board of supervisors determines, upon the facts presented at the

hearing and upon other available information, that there is need, in the interest of the public health, safety and welfare for such a district to function in the territory considered at the hearing, it shall make and record such determination and shall define by metes and bounds or by legal sub-divisions, the boundaries of such district. The board of supervisors, in making such determination, may advise and consult with the state soil and water conservation committee.

C. If the board of supervisors determines after the hearing that there is no need for such a district to function in the territory considered at the hearing, it shall make and record such determination and shall deny the petition. (Laws 1961, ch. 215, § 7.)

§ 41-354.8. Referendum prerequisite to establishment—Generally.—After the board of supervisors has made and recorded a determination that there is a need, in the interest of the public health, safety and welfare, for the creation of the proposed watershed improvement district, it shall consider the question whether the operation of such a district within the proposed boundaries with the powers conferred upon such district in this act [§§ 41-354.1 to 41-354.26] is administratively practicable and feasible. To assist the board of supervisors in this determination, the board shall, within not more than sixty days after entry of the finding that there is need for organization of such a district and the deter-

mination of the boundaries of such district, hold a referendum within the proposed district upon the proposition of the creation of such district. Due notice of such referendum shall be given by the board of supervisors. Such notice shall state the date of holding the referendum, the hours of opening and closing the polls and shall designate one or more places within the proposed district as polling places. The board of supervisors shall appoint a polling superintendent and other necessary polling officers. (Laws 1961, ch. 215, § 8.)

§ 41-354.9. Same—Voting; ballots; right of landowners to vote; proxies.—A. The question to be voted on shall be submitted by ballots upon which the words "For creation of_____ _____Watershed Improvement District" and "Against creation of_____ Watershed Improvement District" shall appear, with a square before each proposition and a direction to insert an "X" mark in the square before one or the other of the propositions as the voter may favor or oppose creation of such district. The ballot shall set forth the boundaries of the proposed watershed improvement district as determined by the board of supervisors.

B. All owners of land lying within the boundaries of the proposed district, as determined by the board of supervisors, shall be eligible to vote in the referendum. Only such owners of lands shall be eligible to vote. Any such owner who is unable because of illness or absence

from the district to appear at the polls, may appoint in writing on a form prescribed by the state soil and water conservation committee and acknowledged before a notary public or other officer authorized to administer oaths, an agent or proxy to cast a ballot for him. The appointment of agent or proxy shall be presented to the polling officers, and if it is found to be bona fide and in proper form, the holder thereof shall be allowed to vote in behalf of the owner executing the appointment. Prior to casting his ballot, each owner shall present to the polling officers an affidavit stating that he is an owner of land within the district and showing the number of acres he owns and his interest therein, and each agent or proxy shall present a similar affidavit executed by the landowner for whom he is voting. Each landowner shall be entitled to one vote in the referendum. (Laws 1961, ch. 215, § 9.)

§ 41-354.10. Same—Counting and recording votes; action upon results; certification of fact when created.—The votes cast in the referendum shall be counted by the polling officers at the close of the polls and a report of the results, along with the ballots, shall be delivered to the polling superintendent, who shall certify the results to the board of supervisors; and the board shall then consider and determine whether the operation of the district within the defined boundaries is administratively practicable and feasible. If the board of supervisors shall determine that the opera-

tion of the watershed improvement district is not administratively practicable and feasible, it shall record such determination and deny the petition. If the board of supervisors shall determine that the operation of the watershed improvement district is administratively practicable and feasible, it shall declare the watershed improvement district to be created; provided, however, that the board of supervisors shall not have authority to determine that the operation of the watershed improvement district is administratively practicable and feasible unless at least a majority of the votes cast in the referendum, which affirmative votes represent [a] majority of the acreage contained in the proposed watershed improvement district, favor creation of the watershed improvement district. Upon declaring the watershed improvement district to be created, the board of supervisors shall certify the fact of the creation of such district to the county clerk of the county or counties in which such district is situated for recordation; and such watershed improvement district shall thereupon constitute a governmental subdivision of this state and a public body corporate and politic. After being recorded, the certificate of the board of supervisors shall be filed with the secretary of state, and a copy thereof shall be filed with the state soil and water conservation committee. (Laws 1961, ch. 215, § 10.)

§ 41-354.11. Inclusion of additional land; detaching land; change of boundaries; change of

name.—A. Petitions for including additional territory within an existing watershed improvement district may be filed with the board of supervisors, and in such cases the proceedings herein provided for with respect to petitions to organize watershed improvement districts shall be observed to the extent deemed practicable in acting upon petitions for such inclusion. In determining whether the operation of a watershed improvement district, including such additional territory, will be administratively practicable and feasible, the board of supervisors shall advise and consult with the directors of the existing watershed improvement district. Where the total number of owners of land in the area proposed for inclusion shall be less than ten (10), the petition may be filed when signed by a majority of the owners of land in such area, representing a majority of the acreage contained in such area, and in such case no referendum need be held. If the board of supervisors makes a determination in favor of the inclusion of additional territory, it shall certify the fact of such inclusion of additional territory to the county clerk of the county or counties in which the watershed improvement district is situated. After being recorded, the certificate of the board of supervisors shall be filed with the secretary of state and a copy thereof shall be filed with the state soil and water conservation district.

B. The owner or owners of land which has not been, is not, and cannot be benefited by its inclusion in the watershed improvement district may petition the board of supervisors to have such land withdrawn. The petition shall describe such land and state the reasons why it should be withdrawn. A hearing shall be held within thirty (30) days after the petition is received. Due notice of such hearing shall be given by the board of supervisors. If it is determined by the board of supervisors that such land has not been, is not, and cannot be benefited by its inclusion in the watershed improvement district, such land shall be withdrawn from the district. A copy of such determination and withdrawal shall be certified to the county clerk of each county in which any portion of such withdrawn land is situated. After being recorded, the certification shall be filed with the secretary of state and a copy thereof shall be filed with the state soil and water conservation committee.

C. Petitions for a change in the boundaries of watershed improvement districts may be filed with the board or boards of supervisors of the soil and water conservation district or districts to be affected. The board of supervisors of the soil and water conservation district or joint board of supervisors if more than one soil and water conservation district is affected may require such hearings or referenda as it deems appropriate to enable it to make a determination as to the desirablity of the pro-

posed change. If the board of supervisors or joint board of supervisors makes a determination in favor of the change in boundaries, it shall certify the fact of such change to the county clerk of the county or counties in which such watershed improvement district is situated and shall notify the board of directors of the watershed improvement district, setting out in such notice the new boundaries of the district. After being recorded, the certificate of the board of supervisors shall be filed with the secretary of state and a copy thereof shall be filed with the state soil and water conservation committee.

D. Petitions for a change of name of a watershed improvement district may be submitted to the board or board of supervisors of the soil and water conservation district or districts in which the watershed improvement district is situated. If the board of supervisors approves the change of name, it shall certify the fact of such change of name to the county clerk of the county or counties in which the watershed improvement district is situated and shall notify the board of directors of the watershed improvement district of such change. After being recorded, the certificate shall be filed with the secretary of state and a copy thereof shall be filed with the state soil and water conservation committee. (Laws 1961, ch. 215, § 11.)

§ 41-354.12. Board of directors—Eligibility; nominating petition; election; terms; officers.

—A. Within thirty days after a watershed emprovement district is created, the board of supervisors shall cause an election to be held for the election of a board of directors of the watershed improvement district. Due notice of such election shall be given by the board of supervisors. The board of directors shall consist of five members. The first board of directors shall determine by lot from among its membership, two members to serve terms of one year, two members to serve terms of two years, and one member to serve a term of three years. Thereafter, as these initial terms expire, the members of the board of directors shall be elected for terms of three years. Vacancies occurring before the expiration of a term shall be filled for the unexpired term by appointment by the remaining members of the board of directors with the approval of the board of supervisors. The board of directors shall, under the supervision of the board of supervisors, be the governing body of the water shed improvement district.

B. The board of directors shall annually elect from its membership a chairman, secretary, and treasurer. The treasurer shall execute a surety bond for the faithful performance of the duties of his office, which bond shall be approved by the board of directors. Any premium for such bond shall be paid by the watershed improvement district. The district shall be subject to an annual audit of its accounts by the state examiner.

C. Nominating petitions may be filed with the board of supervisors to nominate candidates for directors of the watershed improvement district. No such nominating petition shall be accepted by the board of supervisors unless it shall be signed by ten (10) or more owners of land lying within the boundaries of such watershed improvement district, or by a majority of such owners if there be less than ten (10). Such owners may sign more than one such nominating petition to nominate more than one candidate for director. No person shall be eligible to be a director of a watershed improvement district who is not an owner of land within the watershed improvement district in which he seeks election. (Laws 1961, ch. 215, § 12.)

§ 41-354.13. Same—Powers generally.—Under the supervision of the board of supervisors, the board of directors of a watershed improvement district shall have power to:

A. Levy and collect assessments for special benefits accruing to land, as hereinafter provided.

B. Acquire by purchase, exchange, lease, gift, grant, bequest, devise, or otherwise, any property, real or personal, or rights or interests therein, maintain, administer, and improve any such property; and sell, lease, or otherwise dispose of any such property in furtherance of the purposes and provisions of this act [§§ 41-354.1 to 41-354.26].

C. Exercise the power of eminent domain and in the manner provided by law for the condemnation of private property for public use.

D. Construct, improve, operate and maintain such structures as may be necessary for the performance of any authorized function of the watershed improvement district.

E. Borrow such money as is necessary to carry out any of the purposes and provisions of this act, and issue, negotiate, sell its bonds or other evidence of indebtedness as provided in section 14 [§ 41-354.14].

F. Cooperate with, and receive from or grant assistance to, towns, cities, counties, and state and federal agencies in carrying out the purposes and provisions of this act. (Laws 1961, ch. 215, § 13.)

§ 41-354.14. Same—Issuance of Bonds.—A. Bonds authorized by section 13 [§ 41-354.13] shall not be issued until proposed by order or resolution of the board of directors specifying the purpose for which the funds are to be used, the rate of interest the bonds are to bear, the amount of the proposed bond issue, terms of the bonds, and the proposed method of payment and redemption of the bonds prior to maturity. A copy of the order or resolution shall be certified to the board of supervisors.

B. The board of directors shall conduct a hearing on such proposal after due notice of such hearing has been given. If it appears

that the proposal is within the scope and purpose of this act [§§ 41-354.1 to 41-354.26] and meets all other requirements of the law, the proposal shall be submitted to the landowners of the watershed improvement district by a referendum held under the supervision of the board of supervisors.

C. The provisions of sections 7, 8, 9, and 10 [§§ 41-354.7 to 41-354.10], as to notice and manner of holding a referendum in organizing a watershed improvement district shall be applicable to the referendum held under this section.

D. If two-thirds of the votes cast, which votes represent a majority of the acreage contained in the watershed improvement district, are in favor of the proposed bond issue, such bonds shall be authorized and may be issued.

E. Bonds authorized and issued shall bear interest at a rate not exceeding ten per centum (10%) per annum, payable annually, and shall be due and payable not more than fifty (50) years from their dates. The form, terms, and provisions of such bonds, provision for their payment and provisions for their retirement and calling not inconsistent with law, shall be determied by the board of supervisors. Such bonds shall be exempt from all state, county, municipal, school, and other taxes imposed by a taxing authority of this state. (Laws 1961, ch. 215, § 14; 1971, ch. 254, § 37.)

The 1971 amendment increased the interest rate in subsection (E) from six percent to ten percent.

§ 41-354.15. Same—Per diem and mileage.—Members of the board of directors shall receive no salaries, but such members may be entitled to expenses for meetings and travel in the performance of their duties as approved by the board of supervisors. (Laws, ch. 215, § 15.)

§ 41-354.16. Hearing on proposed projects.—Before any contract shall be let or work begun upon any improvement or project within the watershed improvement district, the cost of which cannot be exclusively financed by funds on hand, grants in aid, or financial assistance or gifts to the district, or before any contract may be entered into by the district with any governmental agency or body which will obligate the district to contribute financially beyond the extent of funds of the district then on hand, it shall be the duty of the board of directors to set a time and place within the district for a public hearing upon such proposal. Due notice of such hearing shall be given by the board of directors.

At the time and place fixed for such hearing any owner of land situated within the watershed improvement district, or any other interested person, may appear and be heard as to his objections to such proposal.

Following the public hearing the board of directors shall, by order or resolution, either affirm the proposal with or without modification or amendments, or disapprove the proposal. If the board of directors affirms the proposal, it shall determine the probable cost of and the proposed method of financing the improvement or project, the benefits to be derived therefrom, and whether the benefits will be conferred upon all land within the watershed improvement district or upon only certain land within the district, in which latter case the land to be benefited shall be described as to boundaries, ownership, and approximate acreage. (Laws 1961, ch. 215, § 16.)

§ 41-354.17. Appointment of appraisers and appraisal of benefited property.—If the board of directors determines that the proposed improvement or project should be constructed and that the costs thereof should be paid by special assessment against the land benefited by such improvement or project, it shall appoint three qualified and disinterested residents of the state to act as appraisers. The appraisers shall inspect the plans and specifications of the proposed improvement or project and examine all land likely to be benefited thereby. The appraisers shall make and file with the board of directors a detailed report showing all tracts of land within the watershed improvement district found to be benefited, together with the acreage thereof, the name of the record owner of each tract, the

amount each tract will be benefited, and the amount of assessment to be levied against each tract, which assessment against each tract shall be in proportion to the benefits accruing to such tract. Any necessary expenses connected with making the appraisal by the three appraisers shall be paid by the watershed improvement district. (Laws 1961, ch. 215, § 17.)

§ 41-354.18. Hearing on report of appraisers.—Upon receiving the report of the appraisers the board of directors shall fix a time and place within the watershed improvement district for hearing any complaint that may be made regarding the benefits appraised to any tract of land or the assessment proposed to be levied against any tract of land. Dut notice of such hearing shall be given by the board of directors. At the time and place fixed for such hearing the board of directors shall consider the report of the appraisers and consider and hear any objections filed or voiced thereto. The board of directors shall, by order or resolution, reject the report of the appraisers or accept the report and ratify it with or without modification or amendments. (Laws 1961, ch. 215, § 18.)

§ 41-354.19. Appeal from approval of project or determination of benefits or assessments.—Any owner of land or person having an interest therein upon which an assessment is proposed to be levied may, within thirty (30) days from such order or resolution of the

board of directors accepting the report of the appraisers, file with the clerk of the district a written notice making demand for trial by the court. The notice shall state definitely from what part of such order or resolution the appeal is taken and shall set forth any other objections of the apellant [appellant]. In case more than one appeal is taken, the court may, upon finding that the appeals may be consolidated without injury to the interests of anyone, consolidate and try the appeals together. Any hearing on appeal provided for herein in the district court shall be de novo, and the district court shall consider not only the question of procedure but also the merits of the point or points appealed from, including but not limited to eminent domain proceedings. Any appeal from a decision of the district court shall follow the usual rules of civil procedure.

If no appeal is taken within the time prescribed in this section from such order or resolution of the board of directors accepting the report of the appraisers, or after finding of the court in case an appeal is taken from such order or resolution of the board of directors, then such assessments shall be final and conclusive and shall constitute perpetual liens upon the land so assessed until they are fully paid. (Laws 1961, ch. 215, § 19.)

§ 41-354.20. Assessment of benefits against land of state and its subdivisions. — In case land belonging to the state, or a county, school district, or other public corporation is bene-

fited by any improvement or project constructed under the provisions of this act [§§ 41-354.1 to 41-354.26], all of such benefits shall be assessed against such land and the assessments shall be paid by the proper authorities at the same time as the assessments are called and paid in the cases of private persons. (Laws 1961, ch 215, § 20.

§ 41-354.21. Assessments generally. — The board of directors shall, on or before the third Monday in July of each year, certify to the board of county commissioners of the county within the watershed improvement district in which assessed lands is located the amount of the annual installments of assessments against such land, together with a fair proportionate amount of the estimated operating and maintenance charges apportioned to such land for the next succeeding year. Thereupon the county commissioners shall certify to and deliver such assessment roll to the county assessor of such county and such county assessor shall extend the amounts so certified on the tax roll as a flat special assessment against the land benefited. Such assessments shall be subject to the same interest and penalties in case of delinquency as in the case of general taxes, and shall be collected at the same time and in the same manner as in the case of general taxes; provided, that such assessments shall become due and payable only at such times and in such amounts as may be determined by the board of directors; and provided

further, that any person having an interest in land assessed under this act [§§ 41-354.1 to 41-354.26] may at any time within thirty (30) days after the order of the board of directors has become final and effective as provided in section 19 [§ 41-354.19], pay to the tax collector the amount of the assessments against his land or any tract thereof, and said payment shall relieve said land from the lien of said assessment for the cost of the improvement or project.

The board of directors in making the annual assessments and levies as herein provided, shall take into account the maturing indebtedness for the ensuing year as provided in its contracts, the maturing of bonds and interest on all bonds, and deficiencies and defaults of prior years, and shall make ample provisions for the payment thereof; provided however, that no one yearly call for assessment by the board of directors shall be in an amount to exceed ten per centum (10%) of the actual amount necessary to defray the cost of the construction of such improvement or project. (Laws 1961, ch. 215, § 21.)

§ 41-354.22. Levy, collection and disposition of taxes and special assessments; expenditure of funds.—It shall be the duty of the officer or body having authority to levy taxes within each county, to levy the taxes and special assessments as provided in this act [§§ 41-354.1 to 41-354.26] and it shall be the duty of all county officials, charged with the duty of collecting taxes, to collect the taxes and special assess-

ments as provided in this act in the time, form and manner and with like interest and penalties as city or county taxes are collected, and when collected to pay the same to the board of directors of the watershed improvement district ordering their levy and collection and the payments of such collections shall be made through the treasurer of the watershed improvement district and deposited in the depository thereof to the credit of such district. All expenditures of such funds shall be made by the board of directors upon order of the board, under the supervision of the board of supervisors. (Laws 1961, ch. 215, § 22.)

§ 41-354.23. Lien of assessment; collection delinquent assessments.—All taxes and assessments levied against any land under this act [§§ 41-354.1 to 41-354.26] together with all interest thereon and penalties for default in payment thereof, and all costs of collecting the same, shall, until paid, constitute a perpetual lien upon such land on a parity with the tax lien of general, state, county, city, town or school taxes and no sale of such land to enforce any general, county, city, town or school tax or other liens shall extinguish the perpetual lien of such taxes and assessments. If the taxes and assessments levied are not paid as herein provided, then such land shall be sold at the regular tax sale for the payment of said taxes and assessments, interest and penalties, in the manner provided by the statutes of this state for selling real property for non-pay-

ment of general taxes. (Laws 1961, ch. 215, § 23.)

§ 41-354.24. Discontinuance of districts.—A. At any time after five years from the organization of a watershed improvement district, ten or more landowners within the district, or if less than twenty landowners are involved, a majority of the landowners in such district, may file a petition with the board of supervisors, praying that the existence of the watershed improvement district be discontinued. The petition shall state the reasons for discontinuance, and that all maintenance and operation assurances and other obligations of the district have been met. A copy of such petition shall be furnished to the secretary of state and to the state soil and water conservation committee.

B. After giving due notice of a hearing on such petition, the board of supervisors may conduct such hearing on the petition as may be necessary to assist it in making a determination.

C. Within sixty (60) days after the petition is filed, a referendum shall be held under the supervision of the board of supervisors substantially as provided for in section 8 [§ 41-354.8]. No informalities in the conduct of the referendum or in any matters relating to the referendum shall invalidate it or its results if due notice of the referendum has been given.

D. If a majority of the votes cast in such referendum favor the discontinuance of the watershed improvement district, and the board of supervisors determines that all maintenance and operation assurances and other obligations of the district have been met, the watershed improvement district shall be discontinued. A copy of such determination and discontinuance shall be certified to the county clerk of the county or counties involved for recordation. After being recorded, the certification shall be filed with the secretary of state and a copy thereof shall be filed with the state soil and water conservation committee. (Laws 1961, ch. 215, § 24.)

§ 41-354.25. Supervision by state soil and water conservation committee upon discontinuance.—If any soil and water conservation district in which a watershed improvement district is situated is discontinued, the state soil and water conservation committee shall thereafter serve in the same supervising capacity over the watershed improvement district as was therefore served by the board of supervisors of such soil and water conservation district. (Laws 1961, ch. 215, § 25.)

§ 41-354.26. Existing water rights preserved.—Nothing in this act [§§ 41-354.1 to 41-354.26] shall be so construed as to in any manner impair existing water rights, appropriations or priorities. (Laws 1961, ch. 215, § 26.)

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MICHAEL RUBAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1069

ASSOCIATED ENTERPRISES, INC. and
JOHNSTON FUEL LINERS,

Appellants,

VS.

TOLTEC WATERSHED IMPROVEMENT
DISTRICT,

Appellee.

APPEAL FROM THE SUPREME COURT OF WYOMING

BRIEF OF APPELLEE

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SUMMARY OF ARGUMENT

1. A state may pass legislation classifying persons and objects for voting purposes if the classification is reasonable and natural considering the purpose of the legislation. The courts must look to the affect and not the form of the classification. A statutary discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.

The res.riction of the voting franchise to property owners is reasonable and natural considering that the primary purpose of the legislation is to furnish irrigation water to their land.

If this were a "popular election" with the universal re-

quirements for voters of citizenship and residency then Appellants could not vote because they are corporations.

2. The one man—one vote rule does not apply here because non-property owners do not have "a stake equal" to property owners in the benefits to be derived nor in the costs.

None of the cases cited by Appellants apply because a watershed district does not, by any stretch of the imagination, exercise general governmental powers nor does it have an affect on the resident population that a school district or a bond issue for sewers, etc. would have. The interests of the non-property owners in the function of the district is nonexistent or slight.

The group characteristics of the property owners bears a valid relation to the interest of the group in the subject matter of the election.

Appellants, as corporations, have no standing to sue under the protection of the Fourteenth Amendment or the one man—one vote cases cited.

A watershed district is a quasi-public corporation not a governmental unit in the strictest sense.

The very fact that one of the Appellant corporations is legally allowed to vote in the watershed elections removes those elections from consideration under the one man—one vote doctrine.

THE LIMITING OF A VOTING FRANCHISE TO PROPERTY OWNERS IS AN UNREASONABLE, ARBITRARY AND CAPRICIOUS CLASSIFICATION

Appellants do not argue that classifications cannot be made. Indeed they say that "It is well settled that a state

may classify persons and objects for the purpose of legislation and pass laws applicable only to persons or objects within a designated class. . . .The state has a right to make reasonable classifications and to make voting conditions upon which voting may be exercised." (Appellants' Brief page 13.)

Appellants go on to argue that the classification must be reasonable and natural and must have a rational basis and that mere classification itself does not deprive a group of equal protection. (Appellants' Brief page 14.) And they quote the following case in support.

> *LUDWIG v. HARTSON (Wyo. 1948) 197 P2d. 252, page 257 the Wyoming Supreme Court said:*
>
> "A classification must be reasonable in view of the objects sought to be accomplished. The discrimination must rest upon some reasonable ground of difference between the persons or things included and those excluded, having regard to the purpose of the legislation and within the sphere of its operation the statute must affect all persons similarly affected."

From a practical standpoint the object here sought to be accomplished by the organization of a watershed district is primarily to put surplus water to a beneficial use. The reasonable ground of difference between the persons or things included and those excluded could not have been made on a more rational basis than it was when the legislature differentiated between land owners and non-land owners. The land owners are the only people who benefit primarily and directly from the utilization of the water and they are the only ones who must pay for it.

16 Am. Jur. 2d. at pages 859—861 states as follows:

"The rule is well stated that a state may classify persons and objects for the purpose of legislation and pass laws applicable only to persons or objects within a designated class, for the purpose of obtaining revenue, applying the police power, strictly so-called, or increasing the industries of the state, *developing its resources*, or adding to its wealth and prosperity. . . ." (Emphasis supplied)

"It is class legislation, discriminating against some and for others, that is prohibited by the equal protection guarantee. The guarantee does not intend to take from the states the right and power to classify the subjects of legislation. It does not prohibit or prevent classification, provided such classification of persons and things is reasonable for the purpose of legislation, is based on proper and justifiable distinction, considering the purpose of the law, is not clearly arbitrary, and is not a subtrifuge to shield one class or unduly to burden another or to oppress unlawfully in its administration. . . . The Constitution does not require situations which are different in fact or opinion to be treated in law as though they were the same."

And 16 Am. Jur. 2d. at pages 865—866 states:

"In the determination of the legality of the classification for legislative regulation, the subject to be regulated, the character, extent, and purpose of the regulation, the classes of persons legally and naturally affected by the regulation, and the particular classification and regulation adopted by the statute should be considered. Difficulty is often experienced in determining

> whether all those belonging to the classes legally and naturally affected by the regulation are included in the classification made or whether any are illegally excluded from the particular classification adopted by the statute. The inquiry should be whether the distinctive characteristics upon which it is proposed to found different treatment are such as in the nature of things will denote in some reasonable degree a practical and real basis for discrimination. The courts must look to the affect and not to the form of the classification."

For the Appellants to argue that a tenant at sufferance and their employees are as equally concerned with the construction of a water storage project as the actual land owners is unrealistic. The United States Supreme Court stated in the case of WILLIAMS v. RHODES 393 U.S. 23, 21 L.Ed. 2d 24, 89 S.Ct. 5, in 21 L.Ed. 2d at page 31 as follows:

> "It is true that this court has firmly established the principle that the Equal Protection Clause does not make every minor difference in the application of laws to different groups a violation of our Constitution. But we have also held many times that "indivious" distinctions cannot be enacted without a violation of the Equal Protection Clause. In determining whether or not a state law violates the Equal Protection Clause, we must consider the facts and circumstances behind the law, the interest which the state claims to be protecting, and the interests of those who are disadvantaged by the classification."

In McGowan v. Maryland, 336 U.S. 420, 425, 81 S.Ct. 1101, 1105, 6 L.Ed. 2d. 339, 399 (1961) Mr. Chief Justice Warren wrote:

> "Although no precise formula has been developed, the Court has held that the Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The Constitutional safeguard is offended only if the classification rests on ground wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it."

And at page 1188 in the same case, Mr. Justice Frankfurter said:

> "Neither the Due Process nor the Equal Protection Clause demands logical tidiness. * * * * No finicky or exact conformity to abstract correlation is required of legislation. The Constitution is satisfied if a legislature responds to the practical living facts with which it deals. Through what precise points in a field of many competing pressures a legislature might most suitably have drawn its lines is not a question for judicial examination. It is enough to satisfy the Constitution that in drawing them the principle of reason has not been disregarded."

Under Appellants contention the opportunities for fraud on the part of a land owner who would be opposed to the formation of a watershed district would be almost unlimited. All they would have to do is lease portions of their land, without even a written commitment, to enough so-called lessees so that a majority in number could defeat

all of the surrounding land owners. The same thing could be done by hiring an excess of employees just prior to election.

The facts and circumstances behind the watershed law are clear. In Wyoming we have a particular urgency in attempting to apply our surplus waters to beneficial use before they are claimed by other states. The federal government has enacted legislation which allows Congress to appropriate grants to aid in the construction of these projects. The federal government has also made provisions for loans by the Farmers Home Administration to the particular projects to make up the balance of the cost. The bonds provided for in the act are the security for these loans. The watershed law was enacted in order to take advantage of these congressional programs.

If the requirements had been set forth as they are in all popular elections and the voting franchise had been limited to citizens who were legal residents of the watershed district, the voting classification would have been unreasonable, arbitrary and capricious. It would then have excluded non-resident land owners of all kinds, together with firms and corporations which owned land and maintained their principle offices within the districts.

This would have been clearly unconstitutional because it is the fact of owning land which is affected by the formation and operation of a watershed district that is the subject of all the various elections provided for in the act. The land owners then excluded would be substantially more affected than residents of the district who didn't own land.

In this particular case the watershed district is actually formed by the local soil conservation district after a referendum of the people most affected by it. (W.S. 1957—41-354.10, Appellants' Brief A-62)

25 Am. Jur. 2d. at page 245 states:

> "Though the legislature may create a drainage district or project by direct action, it is not required to do so. It may also by general law provide for the formation of a district by a subordinate agency, in a proceeding instituted for such purpose. This authority is commonly vested either in a court of general jurisdiction, or in a county legislative or administrative body, such as the Board of County Commissioners or Supervisors, or a board of drainage commissioners created for the purpose. The designation of a court to decide the issues is held not objectionable as a delegation of legislative powers to the judiciary, so long as the court is limited to determining the existence of the conditions precedent and is afforded no opportunity to exercise its discretion."

25 Am. Jur. 2d. at page 249 states:

> "In some jurisdictions the tribunal or body is required to investigate the feasibility and desirability of the project through a subordinate agency of one kind or another, and cannot decide the issue until a favorable report has been returned. In a few states the question is required to be submitted to a vote of the persons owning real property within the area that will be subjected to assessment or within the limits of the district to be formed."

In our particular case the subordinate agency is the Laramie River Soil and Water Conservation District and it is required that the issue be submitted to a vote of persons owning real property within the limits of the district to be formed.

THE WEIGHTING OF THE VOTES BY A MAJORITY OF THE ACREAGE IS A DEBASEMENT OF THE VOTES OF THE SMALLER PROPERTY OWNERS AND IS VIOLATIVE OF THE ONE MAN—ONE VOTE RULE.

Appellants quote a series of recent cases from this court. AVERY v. MIDLAND COUNTY, TEXAS, 390 U.S. 474, 20 L.Ed. 2d. 52: But the holding in that case was that since the commissioners court was a unit of local government *having general governmental powers* over the county's entire geographical area, it was subject to the "one man—one vote" rule and the constitution did not permit its members to be apportioned among the single member districts of substantially unequal population. And the case of GRAY v. SANDERS 372 U.S. 368, 83 S. Ct. 801, 9 L.Ed. 2d. 821 held that every voter was equal to every other voter when he cast his ballot *in a state wide election*. The case of EVANS v. CORNMAN, 90 S.Ct. 1752, 26 L.Ed. 2d. 370, held that people living in a federal enclave in Maryland could not be excluded from voting in Maryland elections due to the fact that they had a stake equal to that of other Maryland residents in nearly every election.

Here it cannot be said that the non-land owners have "a stake equal" to land owners in a watershed district. The question here is who benefits and who pays? In the other Supreme Court cases regarding bond elections there was never any question but that the non-property owners benefited substantially as much as the property owners even though the property owners were the only ones who paid.

The applicability of the "one man—one vote" rule is discussed in an annotation in 18 L.Ed. 2d. 1532 at page 1541 where, under the topic of governing bodies of limited-

purpose districts, it was held that the "one man—one vote" rule does not apply to local purpose districts including school boards. Particularly in light of SAILERS v. BOARD OF EDUCATION, 387 U.S. 105, 87 S.Ct. 1549.

The case of HADLY v. JUNIOR COLLEGE DISTRICT OF METROPOLITAN KANSAS CITY, U.S. 90, S.Ct. 790, 25 L.Ed. 2d. 45 (1970) did extend the one man —one vote rule to local school districts. Appellants quote at length from the dissenting opinion of Justice HARLAN. However, the quotations may be out of context. The general tenor of Justice HARLAN'S dissent is one of concern that the court has gone too far in extending the rule in this particular case and he's afraid that it may be even extended far enough down the scale of governmental bodies so that it includes irrigation districts and air pollution control agencies. However, he goes on to say in 90 S. Ct. page 798:

> "In my opinion, this ruling imposes an arbitrary limitation on the ways in which local agencies may be constituted. The court concedes that the States may use means other than apportionment "to insure that legitimate political goals of representation are achieved." For example, officials elected at large may be required to be residents of particular areas that do not contain equal number of people. . . . ; *the right to vote may be denied outright to persons whose interests in the function performed by the agency is nonexistent or slight*. . . . Since the court recognizes the State's need for flexibility in structuring local units, I am unable to see any basis for its selectively denying to them one of the means to achieve such flexibility. If, as the court speculates, other means will prove as effective as

apportionment in adaptation of local agencies to meet specific needs. . . . " (Emphasis supplied)

And Mr. Chief Justice BURGER dissents as follows in 90 S. Ct. page 802:

"I concur fully in the opinion of Mr. Justice HARLAN. I add this comment to emphasize the subjective quality of a doctrine of constitutional law that has as its primary standard "as general rule, that when ever a state or local government decides to select persons by popular election. . . ." the constitution commands that each qualified voter must be given a vote which is equally weighted with the votes cast by all other electors.

The failure to provide guidelines for determining when the courts "general rule" is to be applied is exacerbated when the court implies that the stringent standards of "mathematical exactitude" that are controlling in apportionment of federal congressional districts need not be applied to smaller specialized districts such as the Junior College District in this case. *This gives added relevance to Mr. Justice HARLAN'S observation that "the need for more flexibility becomes greater as we proceed down the spectrum from the state legislature to the single-purpose local* entity.". . . yet the court has given almost no indication of which non-population interests may or may not legitimately be considered by a legislature in devising a constitutional apportionment scheme for a local specialized unit of government.

Ultimately, only this court can finally apply these "general rules" but in the interim all other

> judges must speculate as best they can when and how to apply them. With all deference I suggest the court's opinion today fails to give any meaningful guidelines." (Emphasis supplied)

The HADLY case taken alone would extend the one man—one vote rule somewhat farther down the spectrum of governmental units than the court had previously held, however, it can still be distinguished on the basis that school districts hold more general interest for all of the voters than would a watershed improvement district. One of the foundation stones of our nation is based on the concept that the education of our young is of direct benefit to all of society.

It is interesting to note that all of the cases which Appellants rely upon concern elections involving units of government exercising general governmental powers, school districts or bond elections concerned with local improvements which all the residents may use. In every instance there could be no agument that the citizens whose voting franchise was denied were directly connected with the benefits of the election if not with the costs. To say that a ranch employee or anyone else merely living in a watershed district should be allowed to vote because he's interested in the environment or the fishing is rather ridiculous.

It should also be pointed out that the Appellants, two corporations, would not have been allowed to vote in a single one of the elections contained in their cited cases. Only citizens who were residents and not artificial entities were qualified.

25 Am. Jur. 2d at page 721 said:

> "Persons qualified to vote for members of a state legislature have standing to maintain an

> action brought in a Federal District Court for a declaration that a state apportionment act is unconstitutional under the Fourteenth Amendment and for an injunction restraining defendants from conducting any further elections under the act. In fact, it is only a legal voter whose rights are impinged who may maintain such an action. It has been held that a state has no legal capacity to maintain such an action in federal court, for a state is not a person within the scope of protection of the Fourteenth Amendment. And a state league of municipalities and a state labor association, not being qualified voters, have been held ineligible to maintain such an action.

This court held in GORDAN v. LANCE, 403 U.S. 1, 29 L.Ed. 2d. 273, 91 S. Ct. 1889 at page 1891:

> "We conclude that the West Virginia Court's reliance on the Gray and Cipriano cases was misplaced. The defect this court found in those cases lay in the denial or dilution of voting power because of group characteristics—*geographic location and property ownership—that bore no valid relation to the interest of those groups in the subject matter of the election;*" moreover, the dilution or denial was imposed irrespective of how members of those groups actually voted. . . ."

There could not be a more valid relationship to the interest of those groups in the subject matter of the election than we have here. Appellants argue that lessees who make their living from the land have a more direct interest than absentee property owners. We fail to see the connection in the instant case when Appellant, Johnston Fuel Liners, is a very successful trucking company.

Actually a watershed district, by supplying more water for irrigation purposes and preventing flood damages, enhances the desirability and value of the lease. We can't imagine that the owners of the property, whose costs are increased, would not take this into account when a new lease is negotiated. This becomes a weighing of interests between landlord and tenant. Is the improvement worth the extra rent? It's a matter of private contract. Surely Appellants are not suggesting that lessee and landlord, neither of whom are residents within the district should both have a vote. This would be discrimination against all the other landowners and would unconstitutionally weigh the votes in favor of leasing.

The court goes on to say in the GORDAN case, supra,

> "Thus in Gray, supra at 381 n. 12, we held that the county-unit system would have been defective even if unit votes were allocated strictly in proportion to population. We noted that if a candidate received 60% of the votes cast in a particular county he would receive that county's entire unit vote, the 40% cast for the other candidates being discarded. *The defect, however, continued to be geographic discrimination.* The votes for the losing candidate were discarded solely because of the county where the votes were cast. Indeed votes for the winning candidate in a county were likewise devalued, because all marginal votes for him would be discarded and would have no impact on the state wide total.
>
> Cipriano was no more than a reassertion of the principle, consistantly recognized, that an individual may not be denied access to the ballot because of some extraneous condition, such as

race, . . . wealth, . . . tax status, . . . or military status." (Emphasis supplied)

And in the GORDAN case, supra at page 1892:

"But there is nothing in the language of the Constitution, our history, or our cases that requires that a majority always prevail on every issue. On the contrary, while we have recognized that state officials are normally chosen by the vote of the majority of the electorate, we have found no constitutional barrier to the selection of a governor by a state legislature, after no candidate received a majority of the popular vote. . . .

The Federal Constitution itself provides that a simple majority is insufficient on some issues; the provisions on impeachment and ratification of treaties are but two examples. Moreover, the Bill of Rights removes entire areas of legislation from the concept of majoritarian supremacy. The constitutions of many States prohibit or severely limit the power of the legislature to levy new taxes or create or increase bonded indebtedness thereby insulating entire areas from majority control. Whether these matters of finance and taxation are to be considered as less "important" than matters of treaties, foreign policy or impeachment of public officers is more properly left to the determination by the States and the people than to the courts operating under the broad mandate of the Fourteenth Amendment. . . .

That the bond issue may have the desirable objective of providing better education for future generations goes to the wisdom of all indebted-

ness limitation: it does not alter the basic fact that the balancing of interests is one for the State to resolve." (Emphasis supplied)

From the practical viewpoint watershed districts and irrigation districts in Wyoming could not operate if the one man—one vote rule were to be applied to them. If every employee, resident, lessee, or tenant at sufferance were to be allowed to vote, it would be impossible for the farmers and ranchers who actually own the land to govern the affairs of the district in which they, alone, are primarily interested.

Appellants argue that a watershed district is a governmental subdivision, (Appellants' Brief page 44) because it has the power of eminant domain. If this were so then every public utility must also be a governmental subdivision.

A watershed district is more in the nature of a quasi-public corporation as shown in 18 Am. Jur. 2d. 555:

> "A quasi-public corporation may be said to be a private corporation which has been given certain power of a public nature—such as the power of eminant domain—in order to enable it to discharge its duties for the public benefit, in which respect it differs from an ordinary private corporation, the powers of which are given and exercised exclusively for the profit or advantage of its stockholders. Such corporations are not, however, public corporations."

A private corporation would not have the resources available to complete a large watershed project nor would it qualify for federal aid under the existing programs.

> "A public service or quasi-public corporation is one private in its ownership, but having an appro-

priate franchise from the state to provide for necessity or convenience of the general public incapable of being furnished by private competitive business and dependent for its exercise on eminant domain or governmental agency. Atty. Gen. vs. Haverhill Gaslight Co. 215 Mass. 394, 101 NE 1061."

The various statutes concerning elections in the watershed law contain different criteria for passage of the issue.

Wyoming Statutes, 1957:

Section 41—354.10 concerning the referendum for formation of the district requires a majority vote of the landowners and that majority must represent a majority of the land in the district. (Appellants' Brief A-61-62)

Section 41—354.12 specifies that only a majority of the landowners voting are required and no land is involved. (A-65-67)

Section 41—354.14 (D) states that a ⅔ vote of the landowners representing a majority of the land must affirm before bonds may be issued. (A -69)

Section 41—354.24 requires a simple majority vote to discontinue the district. (A-77-78)

The requirements concerning acreage apply only to the two crucial elections, the first to form a district and the second to incur indebtedness which will be a lien on the land.

Considering, as we must, the purpose of the legislation, it could not have been done more fairly or with more even justice. There can be no "tyranny of the majority". A group of

small landowners could not force a smaller group of large landowners to develop an expensive project because the affirmative votes must represent a majority of the land. The economic burdens of a watershed system are quite high and unless it is really thought to be beneficial it cannot be forced through.

Conversely one or two large landowners, who would benefit the most, cannot force a large number of their smaller neighbors into a project which might ruin them. At least a majority vote of the landowners is always required.

Appellants don't want a so-called "popular election". If the qualifications were changed to fit the usual ones of resident citizens, etc., they wouldn't be allowed to vote at all.

If nothing else distinguishes and exempts the elections provided for in the Wyoming Watershed law from all the cases handed down by this court involving the one man—one vote rule, the very fact that Associated Enterprises, Inc., a Wyoming corporation, is allowed to vote should do it. This is not a "popular election". But it is one admirably designed to fit the purposes of the legislation. It would be patently unfair not to allow a corporate landowner a voice in something which so directly affects its interests.

Again considering the purpose of the legislation, a more just system could not be devised.

CONCLUSION

The statutes under which Appellee was organized are constitutional.

The Wyoming legislature has the power to make reasonable classifications of voters considering the purpose and function of the legislation.

If the same voter qualifications were specified here as

they were in all of the cases cited by Appellants, i.e. citizenship and residency, then Appellant, Associated Enterprises, Inc., would not have been allowed to vote. The system devised by the act in question is much more fair and just, considering the purpose of the law, than the usual voter qualifications.

A watershed district is a quasi-public corporation which does not affect the broad resident population of the district and therefore should not be subject to the one man—one vote doctrine. Its functions are propriatory and not governmental.

The decision of the Wyoming Supreme Court should be sustained.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, FRED W. PHIFER, Attorney for Appellee in the above entitled and numbered cause, hereby certify that on the day of August, 1972 I served three true and correct copies of Brief of Appellee by placing the same in the United States mail, postage prepaid at Wheatland, Wyoming, correctly addressed to:

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DEC 30 1972

In the

Supreme Court of the United States

October Term, 1972

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No. 71-1069

Associated Enterprises, Inc. and Johnston Fuel Lines,

Appellants,

v.

Toltec Watershed Improvement District,

Appellee.

APPEAL FROM THE SUPREME COURT OF WYOMING

No. 71-1456

Salyer Land Company, *et al.*,

Appellants,

v.

Tulare Lake Basin Water Storage District,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA

MOTION OF THE AMERICAN CIVIL LIBERTIES UNION AND THE AMERICAN CIVIL LIBERTIES UNION FOUNDATION SOUTH TEXAS PROJECT, FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*; AND BRIEF *AMICUS CURIAE*

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1069

ASSOCIATED ENTERPRISES, INC. and
JOHNSTON FUEL LINES,

Appellants,

v.

TOLTEC WATERSHED IMPROVEMENT DISTRICT,

Appellee.

APPEAL FROM THE SUPREME COURT OF WYOMING

No. 71-1456

SALYER LAND COMPANY, *et al.*,

Appellants,

v.

TULARE LAKE BASIN WATER STORAGE DISTRICT,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA

MOTION OF THE AMERICAN CIVIL LIBERTIES UNION AND THE AMERICAN CIVIL LIBERTIES UNION FOUNDATION SOUTH TEXAS PROJECT FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

The American Civil Liberties Union and South Texas Project of the ACLU Foundation have requested the parties in these cases to consent to filing the attached brief *amicus curiae* out of time. The Appellants in No. 71-1069 and the Appellee in No. 71-1456 have granted their consent; the Appellee in No. 71-1069 has denied consent.*

The American Civil Liberties Union is a nation-wide, nonpartisan organization of over 180,000 members dedicated solely to preservation of the liberties safeguarded by the Bill of Rights and the 13th, 14th and 15th Amendments to the United States Constitution. The South Texas Project of the ACLU Foundation is a recently created, separate affiliate of the ACLU. The primary purpose of the Project is to secure through litigation the rights of poor Chicanos who dwell in the lower Rio Grande Valley of Texas. Specifically, the project is designed to secure their rights to participate in the governance of the various state created and recognized Water Districts in the lower Rio Grande Valley, to enjoy an adequate supply of potable water, and otherwise to enjoy equally the civil rights and liberties guaranteed to all citizens and residents of the United States.

The lower Rio Grande Valley of Texas is the area at the Southern tip of Texas. Approximately 180,000 people reside in Hidalgo County, 140,000 people in Cameron County, 15-20,000 in Willacy County, and 15,000 in Starr County. About 80% of the approximately 350,000 odd persons in the Valley are Chicanos. Many of these people are migrant laborers who make the Valley their home when they are not migrating to pick crops. Approximately a

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* These letters have been filed with the Clerk of the Court. Through inadvertence, consent from counsel for the Appellants in No. 71-1456 was not sought until earlier this week. When the response to that request has been received, it will be filed with the Clerk.

third of the Chicano population—perhaps as many as 100,000 people—live in groupings of small homesteads called *colonias*. The residents of the *colonias* are almost uniformly denied access to potable water and are denied the right to participate in elections of the some thirty-five Water Districts in the Valley.

The *colonias* consist of small lots subdivided from a common parcel and "sold" under land sale contracts. Typically the buyer advances a very small sum—perhaps five dollars—as a down payment, and is then obligated to pay a similar amount each month. Under this installment arrangement, the interest on the indebtedness alone often exceeds the payments on principal and in practical effect the buyer is more of a lifetime tenant than an owner. The lots within the *colonias* come equipped with virtually none of the amenities normally associated with developed land. There are rough roads, but no provision for water. Although often adjacent to cities, the *colonias* are unincorporated. Cf. *Hawkins* v. *Town of Shaw*, 437 F.2d 1286 (5th Cir. 1971).

The incorporated population centers and many of the larger farms in the four rural counties which comprise the Lower Rio Grande Valley are serviced by "Water Control Improvement Districts" and "Water Improvement Districts"; these are special purpose districts, created under authority of state statute which have the full range of powers normally associated with such districts, including the right to tax and to exercise the power of eminent domain. Through these districts, the residents of the incorporated areas have access to safe drinking water at reasonable prices. The water which is distributed by these districts is drawn from the Rio Grande and then purified in facilities owned and operated by the districts.

The majority of the *colonias* are not serviced by water districts. There are various means by which service is denied, but typically one of two factual patterns prevails. Often, a *colonias* is within the geographic borders of an extant water district, but the district has decided not to service the *colonias*. This common practice is made possible by the state statutes governing the elections of water district officers which either prohibit anyone but the owners and operators of farms from voting, or discourage others from voting, for example, by providing inadequate notice of elections. Accordingly, the residents of the *colonias* in no way comprise the constituency of the elected district officers. A second common pattern involves the delineation of water district lines in such a way that all agricultural land under production is included and adjacent or surrounded *colonias* are excluded. Under Art. 8280-3.2, Vernon's Ann. Tex. Civ. Stats. (1971), the Board of Directors of any Water Control and Improvement District may exclude any urban property (construed to include the *colonias*) by resolution. Various Water Districts have excluded *colonias* wholesale.

On December 15, 1972, the ACLU and the South Texas Project of the ACLU Foundation filed in the United States District Court for the Southern District of Texas, a civil rights class action for injunctive and declaratory relief challenging the exclusion of numerous *colonias* from the Hidalgo County Water Improvement District No. 2 (by resolution dated October 28, 1971) and the Hidalgo and Cameron Counties Water Control and Improvement District No. 9 (by resolutions and orders dated September 6 and October 17, 1972). *Jimenez, et al.* v. *Hidalgo County Water Improvement District No. 2, et al.*, and *Hidalgo* and *Cameron Counties* Water Control and Improvement District No. 9, Civ. Action No. 72-B-171 (U.S. D. Ct. S.D.

Tex.). Allegations are made in the complaint to support several causes of action under the Fourteenth Amendment to the United States Constitution, and 42 U.S.C. §1983. *Colonias* have been unequally excluded from voting of Water Districts. See, e.g., *City of Phoenix* v. *Kolodziejski*, 399 U.S. 204 (1970); *Cipriano* v. *City of Houma*, 395 U.S. 701 (1969); *Kramer* v. *Union Free School District No. 15*, 395 U.S. 621 (1969); *Harper* v. *Virginia State Board of Education*, 383 U.S. 663 (1966); see also, *Gomillion* v. *Lightfoot*, 364 U.S. 339 (1960); cf. *Evans* v. *Cornman*, 398 U.S. 419 (1970). Notice of elections and of resolutions to exclude the *colonias* from Water Districts have not conformed with the elementary requirements of due process of law. See, e.g., *Schroeder* v. *City of New York*, 371 U.S. 208 (1962); *Robinson* v. *Hanrahan*, 34 L. Ed.2d 47 (1972).

Because the issues before this Court in the instant cases are closely related to the issue being litigated on behalf of the impoverished Chicanos dwelling on the *colonias* in the Lower Rio Grande Valley, the *amicus curiae* respectfully prays leave to file this brief out of time.

Respectfully submitted,

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December 1972

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1069

ASSOCIATED ENTERPRISES, INC. and
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Appellants,

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TOLTEC WATERSHED IMPROVEMENT DISTRICT,

Appellee.

APPEAL FROM THE SUPREME COURT OF WYOMING

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Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA

BRIEF OF AMERICAN CIVIL LIBERTIES UNION AND THE SOUTH TEXAS PROJECT OF THE AMERICAN CIVIL LIBERTIES UNION FOUNDATION *AMICUS CURIAE*

Interest of *Amicus*

The interest of the *amicus* appears from the preceding motion.

Statement of the Case

This brief is submitted in two cases raising similar issues.

The first case, *Associated Enterprises, Inc., and Johnston Fuel Lines* v. *Toltec Watershed Improvement District,* No. 71-1069, comes from Wyoming. The Toltec Watershed District was organized under the provisions of Wyoming Statutes 1957 sections 41-354.1 through 41-354.26, which provide that only landowners may vote for the creation of a water district, and that before the district can be created it must be approved by voters who own a majority of acreage contained in the district of creation. Because Johnston Fuel Lines, a Wyoming corporation, does not own land but leases land from Associated Enterprises, Inc., Johnston was unable to vote in the referendum pursuant to which the Watershed Improvement District was created. After it was created, Toltec instituted an action against Associated for a right of entry upon lands owned by Associated and leased to Johnston. The entry was sought to conduct a feasibility study concerning the building of a reservoir on lands owned by Associated and leased to Johnston. Johnston intervened in the action and with Associated defended on the ground that the Toltec Watershed Improvement District was organized under a Wyoming statute which violated the Equal Protection Clause of the Wyoming and United States Constitution. The District Court in and for Albany County, Wyoming upheld the Wyoming Watershed Improvement Act, and on appeal the constitutionality of the Act was again affirmed, 490 P.2d 1069.

The second case is a direct appeal from a three-judge United States District Court in California. *Salyer Land Co., et al.* v. *Tulare Lake Basin Water Storage District,* No. 71-1456. The Tulare Lake Basin Water Storage District was organized under California Water Code Sections 39000-48401. Section 41000 provides, in effect, that only holders of title to land may vote in district elections. Section 41001 provides that each voter may cast one vote for every $100, or fraction thereof, of assessed valuation. Upon creation in 1926, the Tulare Lake Basin Water Storage District was divided into eleven divisions, or election districts, from each of which one member of the governing board is elected. There have been no changes in division boundaries since then.

One of the appellants is a large landowner and lessee of land within the district, one is a small landowner, one is a resident who owns no land, two are small landowners and members of the Board of Directors of the District. They sued under the Fourteenth Amendment and 42 U.S.C. Section 1983 to challenge limitation of voting to landowners within the District, the weighted voting, and malapportionment of voting divisions within the District.

The majority of the three-judge court ruled that limiting the vote to real property owners and weighting their votes according to assessed valuation does not violate the Equal Protection Clause, but that the election divisions within the Water Storage District were unconstitutionally malapportioned because no adjustment had been made in them for 40 years, despite great changes in assessed valuation among the divisions. Judge Browning dissented on the ground that the state unconstitutionally excluded lessees of real property within the District from voting in the elections.

ARGUMENT

A. *Exclusion*

Much of this Court's jurisprudence in the area of voting rights has been developed in cases scrutinizing state schemes, such as the ones here, which denied the franchise outright to certain citizens or groups. Such a judicial response is not surprising, for the right to vote, since it opens the door to the political process, has been the focus of much discrimination. Certain groups or classes were so historically the victims of that discrimination, such as blacks and women, that separate constitutional protection of their franchise was established (in the Fifteenth and Nineteenth Amendments). Yet even in the controversies concerning the franchise of such historically mistreated groups the Equal Protection Clause has loomed large and it is quite clear from our present perspective that much of what was guaranteed under those later Amendments could have been, and frequently was, accomplished under the Equal Protection Clause alone.

Thus, for example, the right of blacks to vote in party primaries is firmly established as a part of the guarantee of the Fifteenth Amendment. *Terry* v. *Adams,* 345 U.S. 461 (1953); *Smith* v. *Allwright,* 321 U.S. 649 (1944). But the same right is also a part of the Equal Protection Clause. *Nixon* v. *Condon,* 286 U.S. 73 (1932) (opinion by Cardozo, J.).

And while the right of blacks not to be disenfranchised by racial gerrymandering is easily found in the Fifteenth Amendment, *Gomillion* v. *Lightfoot,* 364 U.S. 339 (1960), the same result was independently available under the

Equal Protection Clause—as pointed out by Mr. Justice Whittaker, concurring in *Gomillion.* In fact, the theory that the Equal Protection Clause prevents a registrar of voters from refusing to register blacks because of their race was accepted as early as 1927 by Mr. Justice Holmes, writing for a unanimous Court in *Nixon* v. *Herndon,* 273 U.S. 536 (1927).

These cases are the core of the constitutional guarantee of the voting rights of traditionally disfavored groups. They all are, or could have been, equal protection cases. They are straightforward answers to the most obvious types of discrimination.

But just as there are many motives for discriminating at the polls beyond the fear or mistrust based on race or sex or religion, there are many disfavored groups, many neither historically disfavored nor permanently fixed, but carved out to suit some discriminatory goal. For these, too, the Equal Protection Clause has provided shelter. An obvious example is *Harper* v. *Virginia State Board of Education,* 383 U.S. 663 (1966), in which the Court struck down Virginia's poll tax as a violation of Equal Protection since it discriminated against the poor. This class is not one tied to race, sex, or religion, and the historical mistrusts they evoke. Its members are mobile; its boundaries are vague; it is a group that one may enter, or leave. The concept of Equal Protection was flexible enough to protect it.

Carrington v. *Rash,* 380 U.S. 89 (1965), illustrates the same flexibility. There the Court invalidated a Texas constitutional prohibition of voting by servicemen who entered Texas while in service, even though they might be bona fide residents. Here the protected group was even more

temporary than the "poor," and certainly neither historically suspect nor traditionally disfavored. But united by its condition—military status—it was entitled to equal protection.

Kramer v. *Union Free School District No. 15, supra,* continued the process of guaranteeing equal protection of the laws to groups denied the franchise in particular elections for less than compelling state interests or by methods unnecessary to what may or may not have been compelling interests. There the Court invalidated a New York statute which limited participation in school district elections to those who (1) owned or leased taxable real property in the district, (2) were married to one who so owned or leased, or (3) were the parents of or had custody of a child enrolled in a local district school. Pointing out that the petitioner, a bachelor who lived with his parents, was interested in and affected by the outcome of the elections but ineligible to vote in them, as were senior citizens, boarders, clergy, and others, the Court held that this latter group was denied equal protection by the statutory limitation.

More recently this Court decided two cases which, along with *Kramer,* are of obvious relevance here. Both involved local elections to pass upon revenue bonds, *Cipriano* v. *Houma,* 395 U.S. 701 (1969) and general obligation bonds, *Phoenix* v. *Kolodziejski,* 399 U.S. 204 (1970), from which otherwise qualified voters who were not property-taxpayers were excluded. In both, this Court held the excluded groups were entitled to equal protection, and rejected various asserted state interests proffered to justify denying a political voice to those groups. In reaching that result in *Kolodziejski,* the Court held that:

> The differences between the interest of property owners and the interests of non-property owners are not sufficiently substantial to justify excluding the latter from the franchise. 399 U.S. at 209.

The Court went on to reject as justifications several purportedly compelling interests which are virtually indistinguishable from those advanced here.

Cipriano and *Kolodziejski* are extremely important to the cases here because they are the first voting rights cases to apply an equal protection analysis to elections where citizens, instead of voting for public officials who will in turn determine public policy, are themselves passing directly upon questions of public policy. Thus, to the extent that the appellees here claim that persons who are excluded from voting or whose vote is depreciated are disabled in that manner because they have a diminished interest in the issues passed upon by the water districts, *Cipriano* and *Kolodziejski* undermine the districts' contentions. Moreover, in those two cases, this Court applied the rigorous equal protection standard invoked to test infringements of the right to vote, and demanded a showing that the exclusion of some voters was necessary to advance compelling state interests.

These cases demonstrate the willingness of this Court to expand the categories of protected groups far beyond those stable classes traditionally the victims of discrimination, into an infinite number of situations involving the selective distribution of the franchise. They also demonstrate that this Court will not tolerate schemes designed to deny the vote completely to certain groups and individuals.

B. *Dilution*

Relevant to this case is another doctrinal development, of more recent origin: the apportionment or one man–one vote cases. Beginning with the historic decision in *Baker* v. *Carr*, 369 U.S. 186 (1962), this Court has evinced an additional constitutional concern not merely with denial of a political voice to certain classes or citizens, but with *dilution* of that political voice. This second line of decisions involves state geographical districting systems which dilute the effectiveness of the franchise either directly or through the allocation of legislative representation.

Beginning in *Gray* v. *Sanders*, 372 U.S. 368 (1963), continuing in *Wesberry* v. *Sanders*, 376 U.S. 1 (1964) and culminating in *Reynolds* v. *Sims*, 377 U.S. 533 (1964) this Court developed the doctrine that each qualified voter is entitled to an equal voice in the political process. *Reynolds* was a doctrinal watershed where, building upon previous rulings which invalidated attempts to deny the franchise, this Court announced the rule that equal protection safeguarded against not only denial of the vote, but against dilution as well:

> Undeniably the Constitution of the United States protects the right of all qualified citizens to vote, in state as well as in federal elections. A consistent line of decisions by this Court in cases involving attempts to deny or restrict the right of suffrage has made this indelibly clear. It has been repeatedly recognized that all qualified voters have a constitutionally protected right to vote . . . and to have their votes counted. . . . The right to vote can neither be denied outright . . . nor destroyed by alteration of ballots . . . nor diluted by ballot-box stuffing . . . Racially based gerrymander-

> ing . . . and the conducting of white primaries, . . . both of which result in denying to some citizens their right to vote, have been held to be constitutionally impermissible. And history has seen a continuing expansion of the scope of the right of suffrage in this country. The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government. *And the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise. Reynolds* v. *Sims, supra* at 554-55 (citations and footnotes omitted) (emphasis added).

The Court went on to spell out its concern with apportionment schemes which diluted the weight of a citizen's vote, depending on geographic residency:

> Overweighting and overvaluation of the votes of those living here has the certain effect of dilution and undervaluation of the votes of those living there. The resulting discrimination against those individual voters living in disfavored areas is easily demonstrable mathematically. Their right to vote is simply not the same right to vote as that of those living in a favored part of the State. . . . Weighting the votes of citizens differently, *by any method or means,* merely because of where they happen to reside, hardly seems justifiable.
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> Full and effective participation by all citizens in state government requires, therefore, that each citizen have *an equally effective voice* in the election of members

> of his state legislature. Modern and viable state government needs, and the Constitution demands, no less. 377 U.S. at 563-565 (emphasis added).

In numerous cases since then, the Court has utilized this equal voice doctrine, or one man one vote, to require almost absolute equality in population of legislative districts in order to insure that there will be no dilution of the electoral influence of each voter. See, *e.g.*, *Wells* v. *Rockefeller*, 394 U.S. 542 (1969). More relevantly, the dilution doctrine has also been applied to elections for local governing bodies, legislative or governmental. See, *e.g.*, *Avery* v. *Midland County*, 390 U.S. 474 (1968); *Hadley* v. *Junior College District*, 397 U.S. 50 (1970). In *Hadley*, the Court summarized its prior rulings as establishing the principle that "a qualified voter has a constitutional right to vote in elections without having his vote wrongfully denied, debased or diluted" and that all voters had the right "to have their votes given the same weight as that of other voters." 397 U.S. at 52. The Court continued:

> This Court has consistently held in a long series of cases, that in situations involving elections, the States are required to insure that each person's vote counts as much, insofar as it is practicable, as any other person's. We have applied this principle in congressional elections, and local elections. The consistent theme of those decisions is that the right to vote in an election is protected by the United States Constitution against dilution or debasement. 397 U.S. at 54 (footnote omitted).

See also, *Kramer* v. *Union Free School District No. 15*, *supra* ("Thus, state apportionment statutes, which may *dilute* the effectiveness of some citizens' votes, receive close

scrutiny from this Court. . . . No less rigid an examination is applicable to statutes *denying* the franchise to citizens who are otherwise qualified by residence and age." 395 U.S. at 626 [emphasis in original]).

Nor did this Court's decision in *Gordon* v. *Lance*, 403 U.S. 1 (1971) undermine these premises or depart from these traditions.

There, this Court upheld constitutional and statutory provisions which required that referenda to incur state financial indebtedness obtain the approval of 60 per cent of those voting. In so ruling, this Court reaffirmed the principle that "denial or dilution of voting power" could not be premised on "group characteristics—geographical location and property ownership—which bore no valid relation to the interest of those groups in the subject matter of the election . . ." 403 U.S. at 4. Indeed, the Court viewed *Cipriano* as "a reassertion of the principle, consistently recognized, that an individual may not be denied access to the ballot because of some extraneous condition such as . . . wealth . . .", *id.* at 5, and went on to note:

> While *Cipriano* involved a denial of the vote, a percentage reduction of an individual's voting power in proportion to the amount of property he owned would be similarly defective. 403 U.S. at 4, n. 1

Thus, *Gordon* v. *Lance* restates this Court's condemnation of schemes which utilize financial requirements to deny or dilute voting power.*

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* The decision in *Gordon* v. *Lance* rests, in part, on the fact that extramajoritarian requirements are embodied in the federal and various state Constitutions. Similarly, the decision in *James* v. *Valtiera*, 402 U.S. 137 (1971) was partly premised on the democratic value of utilizing referenda.

And again last Term, this Court rejected the twin constitutional evils—total exclusion of a class of citizens from the election process and conditioning access to the ballot on wealth—which are embodied in the Wyoming and California statutes.

In *Dunn* v. *Blumstein*, 405 U.S. 330, 31 L. Ed.2d 274 (1972) this Court struck down a requirement of durational residency as a precondition to voting. The Court summed up the applicable principles in the following way:

> Durational residency requirements completely bar from voting all residents not meeting the fixed durational standards. By denying some citizens the right to vote, such laws deprive them of "a fundamental political right, . . . preservative of all rights." There is no need to repeat now the labors undertaken in earlier cases to analyze this right to vote and to explain in detail the judicial role in reviewing state statutes which selectively distribute the franchise. In decision after decision this Court has made clear that a citizen has a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction. This "equal right to vote" is not absolute; the states have the power to impose voter qualifications, and to regulate access to the franchise in other ways. But, as a general matter, "before that right [to vote] can be restricted, the purpose of the restriction and the assertedly overriding interests served by it must meet close constitutional scrutiny." 31 L. Ed.2d at 284 (citations omitted).

The Court then considered the suggested justifications for a durational residency requirement and held that none of

them was necessary to the accomplishment of compelling state interests.

And in *Bullock* v. *Carter*, 405 U.S. 134, 31 L. Ed.2d 92 (1972) the Court rejected the imposition of direct financial obstacles on access to the ballot. In invalidating excessive filing fee requirements in primary elections, the Court noted that a system which based voting power on wealth, even indirectly, "falls with unequal weight on voters . . . according to their economic status." 31 L. Ed.2d at 100. By contrast, the system here directly and explicitly discriminates against voters "according to their economic status."

C. *The Application of the Two Principles*

Dunn v. *Blumstein* and *Bullock* v. *Carter* reaffirm the two principles from which this Court has not wavered—that absent the most persuasive reasons the state may not deny the vote to any class of citizens or dilute the voting power of citizens on the basis of their financial status.

As the Court's review of its precedents makes clear, it has been preoccupied with the equal protection ramification of both denial and dilution of the right to vote. It has refused to tolerate the exclusion of voters from elections for public officials or from elections where voters are asked to pass directly upon public questions. And the Court has also made it clear that it will be similarly vigilant against schemes which dilute the vote of particular citizens or groups. From these two separate doctrinal strands, a unifying principle emerges: the definition of those who will be entitled to participate in a particular election is subject to rigorous scrutiny to determine whether anyone has been

improperly excluded, and once the electorate for any given election is defined in a constitutional manner, each voter is entitled to an equal voice in the outcome.

The statutes here run afoul of these principles. They presume that only landowners have a cognizable interest in the water resources policies of the community and that that interest is directly proportional to the amount of their holdings. Such reasoning not only reflects a kind of economic royalism abhorrent to our constitutional principles, but it is simply not true. As the motion preceding this brief makes clear, the water resources policies in a given area can be literally vital matters, i.e., matters of life and death, to all residents of the region. When the decision-making process of a local governmental unit, even one with a specialized function, can have such an impact on people, they must not be excluded from the election of its officials. See *Kramer* v. *Union Free School District, supra.*

CONCLUSION

The decisions below should be reversed.

Respectfully submitted,

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NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 71–1069

Associated Enterprises, Inc., and Johnston Fuel Liners, Appellants, *v.* Toltec Watershed Improvement District.

On Appeal from the Supreme Court of Wyoming.

[March 20, 1973]

PER CURIAM.

In this case we are confronted with an issue similar to the one determined today in *Salyer Land Company* v. *Tulare Lake Basin Water Storage District*, — U. S. —. Appellee Toltec Watershed Improvement District was established after referendum held pursuant to Wyoming's Watershed Improvement District Act, Wyo. Stat. Ann. §§ 41–354.1 to 41–354.26. After formation, appellee sought a right of entry onto lands owned by appellant Associated Enterprises, Inc., and leased by Johnston Fuel Liners for the purpose of carrying out studies to determine the feasibility of constructing a dam and reservoir. When Associated resisted, the district sought to enforce its right in state court. Arguing that the statutes authorizing the referendum violated the Equal Protection Clause since under § 41–354.9 only landowners are entitled to vote and under § 41–354.10, a watershed improvement district cannot be determined to be administratively practicable and feasible unless a majority of the votes cast, representing a majority of the acreage in the district, favor its creation, appellants maintained

that the district was illegally formed. The trial court agreed that had the district been formed in violation of the Equal Protection Clause, appellants would have a good defense under state law to the asserted right of entry, but it held against them on the merits. The Wyoming Supreme Court affirmed.

Appellants urge here that the provisions entitling only landowners to vote and weighting the vote according to acreage violate the Equal Protection Clause. Like the California water storage district, the Wyoming watershed district is a governmental unit of special or limited purpose whose activities have a disproportionate effect on landowners within the district. The district's operations are conducted through projects and the land is assessed for any benefits received. *Id.*, §§ 41–354.17, 41–354.21, 41–354.22. Such assessments constitute a lien on the land until paid. *Id.*, § 41–354.23.

We cannot agree with the dissent's intimation that the Wyoming Legislature has in any sense abdicated to a wealthy few the ultimate authority over land management in that State. The statute authorizing the establishment of improvement districts was enacted by a legislature in which all of the State's electors have the unquestioned right to be fairly represented. Under the act, districts may be formed only as subdivisions of soil and water conservation districts. *Id.*, § 41–354.3. And a precondition to their formation referendum is a determination by a board of supervisors of the affected conservation district, popularly elected by both occupiers and owners of land within the district, that the watershed improvement district is both necessary and administratively practicable. *Id.*, §§ 41–354.7, 41–354.8; Wyoming Conservation Districts Law, Wyo. Stat. Ann. § 11–234 *et seq.*, § 11–243. As in *Salyer, supra,* we hold

that the State could rationally conclude that landowners are primarily burdened and benefited by the establishment and operation of watershed districts and that it may condition the vote accordingly. The judgment appealed from is, therefore,

Affirmed.

SUPREME COURT OF THE UNITED STATES

No. 71-1069

Associated Enterprises, Inc., and Johnston Fuel Liners, Appellants, v. Toltec Watershed Improvement District.	On Appeal from the Supreme Court of Wyoming.

[March 20, 1973]

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL concur, dissenting.

I

For the reasons set forth in my dissenting opinion in *Salyer Land Company* v. *Tulare Lake Basin Water Storage District*, — U. S. —, —, I cannot agree that the voting provisions of Wyoming's Watershed Improvement District Act pass muster under the Equal Protection Clause. Accordingly, I dissent.

At issue is Wyoming's Watershed Improvement District Act, Wyo. Stat. Ann. §§ 41-354.1–41-354.26. Appellee Toltec Watershed Improvement District was established as a result of a referendum held pursuant to this Act, May 12, 1960.[1]

[1] Establishment of a Watershed Improvement District entails several steps. First, a petition proposing the creation of such a district must be filed with the board of supervisors of the soil and water conservation district in which the proposed watershed district will lie. § 41-354.5. The petition must set forth the boundaries of the proposed district, reasons justifying creation, and must be signed by a majority of the landowners in the proposed district. *Ibid.*

On receipt of the petition, the board of supervisors must call a public hearing, at which "[a]ll owners of land within the proposed watershed improvement district and all other interested parties shall

The purposes of the Wyoming Act are "to provide for the prevention and control of erosion, floodwater and sediment damages, and the storage, conservation, development, utilization, and disposal of water." Wyo. Stats. 1957, § 41–354.2. These are not purposes related only to special, narrow interests of landowners. As noted in the *Salyer Land Co.* case, flood control is a purpose that effects at least everyone in a watershed district, whether he be owner, lessee, or a resident not engaged in farming, grazing, or other agricultural activity.

In June 1970, appellee sought a right of entry onto lands owned by appellant Associated Enterprises, and leased by appellant Johnston Fuel Liners, for the purpose of carrying out foundation studies for a dam site. When appellant Associated resisted, Toltec sought to enforce its right of entry in state court. The trial court agreed with appellants that if Toltec had been illegally formed, they would have a good defense to the asserted right of entry, but held against them on

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have the right to attend . . . and to be heard." § 41–354.7 (A). The board of supervisors may, after such hearing, determine that there is no need for the creation of the district. If so, the petition is forwith denied. § 41–354.7 (C).

If the supervisors do think there is a need, however, they must further determine whether the proposed district is "administratively practicable and feasible." § 41.354.8. "To assist the board of supervisors in this determination," a referendum must be held in the proposed district "upon the proposition of the creation of such district." *Ibid.* Only owners of land lying within the boundaries of the proposed district may vote in this referendum. § 41.-354.9 (B). If a majority of the landowners representing a majority of the acreage within the district do not vote against creation of the district, the board of supervisors is permitted to determine that the district is administratively practicable and feasible, and to declare it created. *Ibid.*

Once created, a watershed improvement district has broad powers. It may exercise the power of eminent domain, levy and collect assessments, and issue bonds. §§ 41.354.13–41.354.14.

the merits, despite appellants' objections that the referendum which authorized the creation of the watershed improvement district violated the Equal Protection Clause, the franchise being limited to property owners, and the votes being weighted by the amount of property owned. On appeal, the Wyoming Supreme Court affirmed.

I conclude that the presumption set out in *Phoenix v. Kolodjiezski*, 399 U. S. 204, has not been overcome, for "[p]lacing voting power in property owners alone can be justified only by some overriding interest of those owners that the State is entitled to recognize." *Id.*, at 209. Here, the suggestion was made below that property owners are those "primarily concerned" with the affairs of the watershed district. But, assuming *arguendo* that a State may, in some circumstances, limit the franchise to that portion of the electorate "primarily affected" by the outcome of an election, *Kramer* v. *Union Free School District*, 395 U. S. 623, 632, the limitation may only be upheld if it is demonstrated that "all those excluded are in fact substantially less interested or affected than those the [franchise] includes."

Other than the bald assertion by the court below that it "makes sense" to limit the franchise in watershed district referenda to property owners, there is nothing in the record to support the exclusion. Appellant Johnston is a lessee of land in the District. Why a lessee is "substantially less interested" in the creation of a watershed district than is a titleholder is left to speculation.[2] And

[2] The Watershed Improvement Districts Act itself contemplates that nonlandowners interested in the proposed creation of a district, by giving them the right to appear and be heard at the public hearing required by the Act prior to the referendum. See n. 1, *supra*. No reason is advanced why a nonproperty owner can be sufficiently interested in the district to be given a forum, yet is not sufficiently interested to be allowed to implement the views he expresses at that forum through the ballot box.

mere speculation is insufficient to justify an infringement on the right to vote, a right which is "the essence of a democratic society," *Reynolds* v. *Sims*, 377 U. S. 533, 555.

Moreover, we recently stated that "a percentage reduction of an individual's voting power in proportion to the amount of property he owned would be [constitutionally] defective. See *Stewart* v. *Parish School Board*, 310 F. Supp. 1172 (ED La.), aff'd, 400 U. S. 884 (1970)." *Gordon* v. *Lance*, 403 U. S. 1, 4 n. 1.

II

It is argued, however, that unlike "units of local government having general governmental powers over the entire geographic area served by the body," *Avery* v. *Midland County Board of Commissioners*, 390 U. S. 474, 485, a watershed improvement district is "a special-purpose unit of government assigned the performance of functions affecting definable groups of constituents more than other constituents," *id.*, at 483–484. The court below sought to make such an analysis.

The *Avery* test, however, was significantly liberalized in *Hadley* v. *Jr. College District*, 397 U. S. 50. At issue was an election for trustees of a special purpose district which ran a junior college. We said,

> ". . . since the trustees can levy and collect taxes, issue bonds with certain restrictions, hire and fire teachers, make contracts, collect fees, supervise and discipline students, pass on petitions to annex school districts, acquire property by condemnation, and in general manage the operations of the junior college, their powers are equivalent, for apportionment purposes, to those exercised by the county commissioners in *Avery*. . . . [T]hese powers, while not fully as broad as those of the Midland County Commissioners, certainly show that the trustees *perform im-*

> *portant governmental functions* . . . and have *sufficient impact throughout the district* to justify the conclusion that the principle which we applied in *Avery* should also be applied here." *Id.*, at 53–54. (Emphasis added, footnote omitted.)

Measured by the *Hadley* test, the Toltec Watershed Improvement District surely performs "important governmental functions" which "have sufficient impact throughout the district" to justify the application of the *Avery* principle. The District may: levy and collect special assessments, § 41.354.13 (A); acquire and dispose of property, § 41.354.13 (B); exercise the power of eminent domain, § 41.354.13 (C); borrow money and issue bonds, § 41.354.13 (E)—not to mention flood control. § 41–354.2.

The lower court characterized these functions as "proprietary" in nature, rather than "governmental." But that is a meaningless distiction when control of public affairs are at issue. *Cipriano* v. *City of Houma*, *supra*; *Stewart* v. *Parish Board of St. Charles*, *supra*, at 1176. It is hardly to be argued that a public body with the power of eminent domain, to issue bonds, to levy taxes, and to provide plans for flood control does not "perform important governmental functions."

It is also inconceivable that a body with the power to destroy a river by damming it and so deprive a watershed of one of its salient environmental assets does not have "sufficient impact" on the interests of people generally to invoke the principles of *Avery* and *Hadley*.

It is said that there is a difference between an election to create a special-purpose district, and an election either to authorize the district to issue bonds, or to elect district officers. In my view, such a distinction is not tenable.

> "Our exacting examination [of statutes which selectively distribute the franchise] is necessitated not by the subject of the election; rather, it is required

> because some resident citizens are permitted to participate and some are not." *Kramer* v. *Union Free School District, supra,* at 629.

As we said in *Hadley,*

> "If the purpose of a particular election were to be the determining factor in deciding whether voters are entitled to equal voting power, courts would be faced with the difficult job of distinguishing between various elections. We cannot readily perceive judicially manageable standards to aid in such a task. It might be suggested that equal apportionment is required only in 'important' elections, but good judgment and common sense tell us that what might be a vital election to one voter might well be a routine one to another." 397 U. S., at 55.

The mere creation of the Watershed Improvement District subjects residents of the area to constraints. The District may condemn land without further electoral approval; and it has the power to finance improvements through special taxes levied against land to be benefited by the improvements without further electoral approval. While such assesments fall in the first instance on the landowner, lessees and tenants would be substantially affected, as well.[3] And its power to reshape or control the watershed and to provide flood control enables it to turn rivers into flumes or to destroy them by erecting dams to build reservoirs. Dams may be vital or they may be disastrous. The sedimentation rate in some areas is so fast as to reduce the life of dams to a few decades. Dams may destroy valued fish runs. Dams substitute a

[3] Landowners are often able to pass property taxes through to their lessees and tenants. D. Netzger, Economics of the Property Tax (1966). This is especially true in urban areas where the demand for rental housing is price inelastic, but there is no reason why it may not also be true in rural areas, as well.

reservoir for a river and wipe out the varied life of a river course, including its wildlife, canoe waters, camping and picnic grounds, and nesting areas of birds. This reshaping of the face of the Nation may be disastrous, no matter who casts the ballots. The enormity of the violation of our environmental ethics, represented by state and federal laws, is only increased when the ballot is restricted to or heavily weighted on behalf of the few who are important only because they are wealthy.

The issues I tender are disposed of by the suggestions that the members of the legislature of Wyoming passed the Act now challenged, that they represented the people of Wyoming, and that they could therefore put the landowners in command of the environmental problems tendered by this case. That would of course be true if the case presented no federal question. But adherence to *Reynolds* v. *Sims* and its progeny makes the federal rule dominant *viz.* that important governmental functions may not be assigned to special groups, whether powerful lobbies or other discrete groups to which a state legislature is often beholden.

I would reverse the judgment below.